(33)

No. 01-1289

IN THE

Supreme Court of the United States

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Petitioner,

v.

CURTIS B. CAMPBELL and INEZ PREECE CAMPBELL,

Respondents.

ON WRIT OF CERTIORARI TO THE UTAH SUPREME COURT

JOINT APPENDIX

Volume V of VII (pp. 2075a-2458a)

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EXCERPTS OF TRIAL TESTIMONY OF JOHN L. OSPITAL, JUNE 14, 1996

[Vol. 8, R. 10263, commencing at p. 93]

JOHN L. OSPITAL called as a witness by and on behalf of the Plaintiff, having been first duly sworn, was examined and testified as follows:

* * *

[94] **DIRECT EXAMINATION BY MR. HUMPHERYS:**

Q Will you state your full name, please.

A John L. Ospital.

* * *

[95] * * *

Q Do you have children?

A Yes.

Q How many children did you have?

A We had two.

Q And what are their names?

A Todd and Chris Ospital.

Q What is Chris' age?

A Chris is thirty-six now.

Q And what age would Todd have been, if he were alive?

A He'd be twenty-four. No, I'm sorry. He was born in '62, so he would be thirty-four.

Q Thirty-four?

[96] A Thirty-four years old.

Q All right. And how old was he when he passed away?

A Nineteen.

* * *

Q Was your son, Todd, killed in the accident of May 22nd, 1981?

A Yes, he was.

* * *

Q All right. Now, Mr. Ospital, did you, were you sued in behalf of your son's estate by Mr. Slusher?

A Yes.

[97] * * *

Q Thank you. As the case proceeded, Mr. Ospital -- Well, first of all, based on all of the information you knew, did you ever reach a conclusion, or have the opinion that your son was speeding at the time of the accident?

A There was no doubt in my mind he was not [98] speeding.

Q And did you maintain that same feeling and opinion throughout this entire time?

A Absolutely.

Q Was there a period of time that, after this lawsuit began, that you made a decision to file a wrongful death claim?

A Yes.

Q And tell us just briefly why you made that decision.

A Well, I felt like that -- My main purpose in this whole thing was to defend my son. And my son had lost his life, I felt like it was the last thing I could do for him. And so I felt like the people responsible for his death should be proven guilty. And this was my way of doing it.

Q All right. Now, there was a time, was there not, when Allstate desired to discuss settlement of the Slusher claim against your son's estate.

A Yes.

Q Were you aware that Allstate was considering the settlement of that claim against your son's estate?

A Yes, I was aware.

Q Tell us what feelings you had as it related to whether Allstate should or should not settle that [99] case?

A Well, I felt like that if my insurance company was, you know, was going to pay something, that would be admitting guilt on behalf of my boy, and I did not feel like he was guilty.

But I felt like that I was in a turmoil. I was in a bad state of mind, I'd just gone through the most tragic thing that had ever happened to me in my life, and I felt like that I had to defend him, but I was sitting in a position where we were, the lawsuit was going to be filed in Cache valley, with a Cache valley jury, with a Cache valley resident. I did not know if the jury would decide in my favor. So I felt my only option was to let my insurance company pay the amount that they would be willing to pay.

Q At any time did you indicate to Allstate that you believed that your son was at fault and they should settle because of that?

A Absolutely not. Absolutely not.

Q Now, as a part of that time period, was there also an agreement with Mr. Slusher and the attorneys and Allstate that if a bad faith claim was necessary to be filed, that the two parties would then join forces against State Farm if that came to be?

A Yes.

[100] Q Regarding that agreement, Mr. Ospital, was it your intention at that time that you wanted to pursue this against State Farm, and sue them in bad faith, or did you have a desire to have it resolved? What was your intention at this time?

A I wanted closure --

MR. BELNAP: Excuse me, Mr. Ospital. Are you talking about the June, '83 agreement?

MR. HUMPHERYS: Yes.

MR. BELNAP: Or the --

MR. HUMPHERYS: No, the June, 1983 agreement.

Q (BY MR. HUMPHERYS) Go ahead.

A I think all during this whole thing the two things that we wanted was closure, have this thing over with and out of the way. That's why we made an offer of accepting $25,000 from State Farm. They refused that.

Q So it was not your desire to continue on?

A Absolutely, it was not my desire to continue on. We had no other choice.

Q All right, what I wanted to do, then, is you raised the fact that you'd made an offer.

A Yes.

Q To settle for twenty-five. Was that made after this settlement with Mr. Slusher's claim?

A I think it was before.

[101] Q Let me see if I can refresh your memory. Do you recall that your attorney sent a letter to Mr. Bennett offering to settle for $25,000?

A Yes.

Q Let me put it up here on the screen, it's already admitted into evidence, it's a letter dated August 18, 1983, to Mr. Wendell Bennett, and it's signed by your counsel. Now, let's go into the text of it. "Dear Wendell. Trial in the above case is rapidly approaching, and it is necessary that we explore settlement before the expenses of trial are incurred. Extensive discovery has been performed, and there is no need for me to outline the various facts which support the position that defendant Campbell was negligent in passing the vehicles, which precipitated the events leading to the accident, injuries and death of Mr. Ospital.

"We have discussed the facts many times, and you are well aware that many witnesses point a significant amount of blame onto defendant Campbell. I have also represented to you that our expert retained to reconstruct the accident will testify that defendant Ospital was not speeding, and that

once he was forced to the west side of the road, the Campbell vehicle, there was nothing he could have done to prevent the accident, [102] since his car was then out of control.

"I realize that you may have contradicting evidence, however I am sure you realize that Mr. Ospital was killed in the accident, and the Campbells had no damages or injuries whatsoever. In light of the evidence, it is quite likely that a jury will find defendant Campbell at least more negligent than defendant Ospital.

"You have met Mr. and Mrs. John Ospital, and you know what fine people they are. You have deposed them and are aware of the great loss they have suffered due to the death of their son. Their son was an outstanding individual, not only to their family, but also to society. The Ospitals have suffered greatly as a result of the loss of their son.

"You have represented that State Farm has a policy limit of $25,000 per person. I understand that the plaintiff has made demand for $25,000." The plaintiff being Mr. Slusher, right?

A Uh-huh.

Q "Since there is $50,000 coverage per occurrence, the Ospitals hereby make demand upon the defendant Campbell and State Farm to pay the amount of $25,000 in full and complete settlement of the wrongful death claim. This offer shall remain open until [103] September 2, 1983, at which time the offer will be rescinded and we will proceed with trial.

"If State Farm fails to protect its insured by settling within the policy limits and we are successful in obtaining a judgment in excess of $25,000, which appears quite likely under the circumstances of this case, we will look to the Campbells for payment of the amount in excess of the insurance proceeds. We will also pursue all remedies and claims that may be available to us against State Farm based upon its bad faith and reckless indifference to the protection of its insured.

"Even though this offer shall remain open until September 2, we would appreciate a prompt response, in order to avoid any further expense in discovery and trial preparations."

Did this letter accurately represent your feelings, Mr. Ospital?

A Yes, it did. Yes.

* * *

[104] * * *

Q (BY MR. HUMPHERYS) Now, Mr. Ospital, without necessarily giving your opinion as to what damages you thought this claim was worth, did you believe it was worth more than twenty-five?

A Absolutely.

Q Thereafter what was State Farm's response to this offer?

A They refused it. They refused to even recognize any settlement.

Q Did you, during the trial, continue to indicate to State Farm that you would consider to try and settle the case during the trial?

A Absolutely. About every day.

Q And did State Farm -- Well, let me ask. Who was that through?

A Through yourself.

Q And to whom?

A To Wendell Bennett, the representative of State Farm.

Q Did he ever indicate any willingness by State Farm to offer any amount?

A No.

Q Now, was it difficult for you to go through that trial?

[105] A Absolutely.

Q And I think the jury knows the verdict. What were your feelings toward the findings by the verdict regarding your son?

A I was happy that he was exonerated of any wrongdoing. I felt like we had fulfilled one of our goals, and that is to clear his name. And I thought the trial did that.

Q Did you, thereafter, ask State Farm to pay the full amounts of the judgments?

A Yes. Yes, we did.

Q And then you would not pursue any further claims?

A Right.

Q What was their response to that?

A They refused to talk settlement.

Q At this juncture were you then considering the possibility of collecting on your judgment since State Farm did not offer to pay?

A Yes. It was a gut-wrenching situation, where we were angry at losing our son's life. I didn't know how to, you know, how to handle that. I've never had to handle anything like that in my life. I didn't, I felt like that by ruining someone else's life by taking everything they owned was not going to solve anything, [106] either. I was kind of tossed in between. I did not feel like the award was proper, and I did not feel like that the whole situation was like it should have been.

Q Did you then face a decision of whether or not to enter into some kind of agreement with Mr. Campbell?

A Yes.

Q Were you personally involved in that decision? I mean, excuse me, were you personally involved in the negotiations?

A No, I was not.

Q You didn't have any contact with Mr. Campbell at the time?

A No.

Q Did you consider possibly entering into an agreement at that time whether to waive, or to delay your chance of getting recovery by executing on Mr. Campbell's assets, versus entering into an agreement where you would wait and try and get it later, through State Farm, through a separate action?

A I felt like that State Farm had caused me to go through a trial that was not necessary, State Farm had stopped every effort we had made to settle this case, and I felt like that State Farm should have taken the responsibility and done the job they should have [107] done for their clients so this whole thing would have been resolved and we would have been, the closure would have been there, and we would have, it would have been finished.

Q Ultimately -- And I think the jury's heard about the 1984 agreement that was reached. Was that a difficult decision for you to make, to enter into this agreement?

A Yes, it was very difficult.

Q Why was it?

A Because I felt like that one decision was, is to try to take everything of the Campbells away. I didn't feel like ruining another person's life was going to help any. I felt the individuals who were really causing all of this grief and this lack of closure was State Farm. They did not do the job they should have done. And so the only way that I could see that we could resolve this situation is to join in that suit.

Q Did you have any impressions, back at this time when you were making the decision, did you have any guarantee that you would be paid any amount on your judgment?

A No.

* * *

[108] * * *

Q (BY MR. HUMPHERYS) Now, let me go back in time to approximately 1986. Well, let me ask a question before that. Did State Farm ever agree to pay you for the judgment prior to 1986?

A No.

Q In 1986, were there any negotiations that began regarding the payment of the judgments?

A There was, I think, a comment made by Mr. Hanni stating, would we consider this? He did not have approval from State Farm, but would we consider, I think it was $37,000 as a complete settlement of this case. That was two and a half years after the trial.

Q And with interest, about how much would that have been in terms of percentage of the judgment?

A It would be significantly more than that.

Q The judgment would have been significantly more?

A Yes.

Q Your judgment was about fifty-one, $52,000?

[109] A Yes.

Q And interest would have been accruing over the time, and it would have been more than that?

A Yes.

* * *

Q Neither do I. What was your response, or how did you feel toward this suggestion that, this inquiry of whether or not you would be willing to accept $37,000 in full satisfaction of your judgment?

A I thought it was just another attempt by State Farm to wear us down, to try to get us to settle for practically nothing, really. The judgment was out [110] there, I felt like that since we had gone through the trial and gone through all of the agonizing part of that trial, that no way was I going to settle for that amount of money now.

Q Was that conveyed through your counsel to State Farm?
A Yes.
Q And to Mr. Hanni?
A Yes.
Q Thereafter were there further offers made by State Farm?
A Token offers, yes.
Q What was the next offer that you recall?
A They offered to settle for the judgment amount if we did not press the bad faith suit.
Q And that was for the actual judgment of fifty-one, not for the full judgment with interest?
A Yes. Yes.
Q So this was another offer less than the full amount of the judgment?
A Yes.
Q And what was your response to that?
A Refused it.
Q Was there another offer made by State Farm?
A Yes, they finally offered the full amount of [111] the judgment plus interest, but without the, with complete, I don't know what you'd say, how you'd say it legally --
Q Just say it in any words you like.
A Without any strings attached.
Q Would the bad faith claim remain, or would it be extinguished?
A It would be extinguished.
Q And was that acceptable to you at that time?
A No, it was not.
Q Why wasn't it acceptable to simply have your judgments paid at that time, and to go ahead and release, now, the bad faith claim that Mr. Campbell had, or agreed to have Mr. Campbell release his bad faith claim?
A We'd been drug through this whole thing, and I was to a point where I just felt abused by State Farm. And I did

not feel like they were fulfilling their end of the bargain. We had a judgment, and we offered to settle for that judgment, with no strings attached. They refused, and they continued to refuse. They continued to stymie things, delay things.

* * *

[112] * * *

Q (BY MR. HUMPHERYS) Mr. Ospital, when you're talking about the feelings you had, you're describing the frustration of why you did not want to consent to the settlement as proposed, right?
A Yes.
Q Did you have any understanding under the 1984 agreement that all three, the Campbells, Mr. Slusher, and you, and your wife, would need to agree before the bad faith claim could be settled and resolved?
A Yes.
Q Was it your understanding that all three parties felt the same at this time?
A Yes.
Q Now, you understand that the Supreme Court affirmed the verdict in 1989?
A Yes.
Q And State Farm then, within a few weeks, paid your judgment in full with all interest?
A Yes.

[113] * * *

CROSS EXAMINATION BY MR. BELNAP:

Q Mr. Ospital, good morning.
A Good morning.
Q Are you aware, sir, that the verdict from the jury in this case occurred in September of '83; is that correct?
A Yes.

Q And the amended judgment that was entered on the verdict in favor of you and your wife for the claim that had been made against Mr. Campbell was dated December 5, 1983; does that sound correct to you?

A I can't remember for sure.

Q Okay. I think the record reflects that in one of the exhibits.

A Okay.

Q Are you aware, from discussions with Mr. Humpherys, your attorney, that he was going to discuss with Mr. Hoggan and Jensen and Mr. Campbell the concept of entering into some type of an agreement to get the judgments resolved?

A Yes.

Q Did you become aware of, and agree at some [114] point in time, with the concept of entering into an agreement with Mr. Campbell to participate in the proceeds of a lawsuit against State Farm?

A Yes.

Q And you understood that by making that agreement that you would then not proceed against Mr. Campbell's assets; is that correct, sir?

A That's correct.

Q And is it correct that you agreed to that concept in January of 1984?

A I can't remember that date for sure, but --

Q Okay. Mr. Slusher, do you recall your deposition taken in this case?

A You called me Mr. Slusher --

Q I'm sorry?

A You got me confused, there.

Q I saw a blank look on your face and I was wondering what I did. I'm sorry. Mr. Ospital.

A Yes.

Q Do you recall your deposition being taken in this case?

A Uh-huh.

MR. BELNAP: I'd move to publish this so that I could ask him a question, Your Honor.

THE COURT: Motion granted.

[115] Q (BY MR. BELNAP) Could I stand by you for a minute and just show you this?

A Yes.

Q Page 17. "And as of that time, early January of 1984, were you in agreement with the idea that you would not try to collect any money personally from Curtis Campbell in return for Mr. Campbell cooperating in pursuing a bad faith claim against State Farm?" And your answer was, sir?

A "Yes." Yes.

Q Does that refresh your recollection?

A Yes.

Q You heard -- Well, excuse me. You did not hear. I'll represent to you that Mr. Slusher yesterday also indicated that he was in agreement with that concept in January of 1984. Were you aware of that?

A I assumed that he was, yes.

Q Okay. Now, Mr. Ospital, you indicated to this jury that you became aware that State Farm offered to pay the judgments with interest and costs with no strings attached; is that correct?

A Eventually, yes.

Q Now, I understand your testimony that you've given here today, sir, about your feelings, and I'm not going to argue with you about that. But you do not [116] criticize the fact of State Farm making an offer to pay the judgments in full, with interest and costs, with no strings attached, do you?

A Well, if they would have done it right after the judgment was --

Q I understand your position. But I'm asking you if you criticize the fact that they made that offer.

A The timing of the offer was my criticism.

* * *

[117] * * *

Q Thank you. You have told this jury that you felt that the result of the Logan trial fulfilled one of the goals that you had; is that correct?

A Yes.

Q And isn't it true, Mr. Ospital, that you and your wife have both indicated that you felt it was important to be able to air your views and have a decision on this case that occurred in Logan.

A I think our first want was for closure.

Q But haven't you and your wife both testified that you felt it was important to both of you to be able to air your views and have a jury make a decision?

A Yes.

Q And you have indicated in your testimony that, likewise, you felt that payment by or on behalf of the person that was found to be at fault would also assist in closure; isn't that true?

A Yes.

Q Now, it's undisputed, is it not, Mr. Ospital, that within a short period of time after the Supreme Court made its decision in June of 1989, that the judgments, including the judgment that had been entered [118] on your behalf, was paid in full; isn't that true, sir?

A Yes.

Q With interest?

A Yes.

Q And costs.

A Yes.

Q Totalling approximately $88,000; is that correct?

A Yes. That included legal fees and everything.

* * *

[119] * * *

Q All right. Now, Mr. Ospital, this may be obvious to me and to you and to the jury, but just to conclude my examination, when you and your wife were paid the judgment, and your attorney filed a pleading with the court indicating that the judgment was fully paid and satisfied, that payment fully paid the result of the Logan jury verdict, did it not, sir?

A Yes.

Q With the accrued interest at 12 percent, and the cost; is that correct, sir?

A Yes.

* * *

[122] * * *

RECROSS EXAMINATION BY MR. BELNAP:

Q Mr. Ospital, when State Farm filed a pleading with the court, unconditionally, stating that the entire judgment would be paid, with interest and costs, without any conditions, were you sent a letter explaining that, sir?

A Yes.

Q Do you have that letter?

A I don't on me, no.

Q Okay. And you were asked about that in the deposition, and you indicated you were not told that? At least as you remembered in the deposition?

A There was a letter from Mr. Hanni, I think. I got a copy of Mr. Hanni's offer, offering the full judgment. I have a copy of that at home, yes.

Q Okay. But you did not indicate that in the deposition to us.

A Well, I --

Q And we have not seen that letter from [123] Mr. Humpherys, is what I'm asking. If you have it, I'd like to see it.

A I can't remember for sure if I do have it or not. I remember the letter from Mr. Hanni saying that they would pay all of the judgment plus interest, and ask Rich Humpherys to calculate what the costs would be. That was the letter I remember.

Q That was a letter, sir, that was sent after the Supreme Court decided.

A Okay.

Q Okay. Do you have any other letter that you can think of that Mr. Humpherys sent you when State Farm, in August, '86, without condition, promised to pay you and your wife?

A I don't remember that.

Q Okay.

A I do remember the one from Mr. Hanni.

* * * *

EXCERPTS OF TRIAL TESTIMONY OF WINNIFRED P. OSPITAL, JUNE 14, 1996

[Vol. 8, R. 10263, commencing at p. 124]

* * *

WINNIFRED P. OSPITAL called as a witness by and on behalf of the Plaintiff, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION BY MR. HUMPHERYS:

Q Would you state your full name, please.

A Winnifred Parker Ospital.

* * *

[125] * * *

Q I know your husband's given us a little bit about the information about your family, but could you just tell us, briefly, you have two children? You've had two children?

A I had two children. Two sons.

Q Two sons. And we know that Todd was killed in the accident of September of 1981. Mrs. Ospital, when -- You know nothing about the accident, personally, do you? You weren't there, or at the scene?

A Only descriptions that I've heard. Certainly I was not there.

* * *

[126] * * *

Q Okay. Now, we've discussed with your husband the fact that a lawsuit came toward the end of 1981, I think; is that your memory?

A At that time, yes.

Q All right. And you turned the papers over to Allstate, and that I was retained by Allstate to defend you in a claim by Mr. Slusher.

A That's correct.

Q All right. Now, did there come a time when you and your husband -- and I'm referring primarily to you, now, since we've heard from him -- that you decided that it was necessary to bring what is called a wrongful death claim against Mr. Campbell?

A Yes.

[127] Q Can you tell the jury why, if you hadn't brought one by then, why you decided to do it at that time?

A Well, certainly a court action at that very stressful time in our lives was not something we looked forward to, but the most precious thing in our lives had been taken, and we felt that since he was not able to speak for himself, the really only thing, and certainly the last thing we could do for him was to speak for him. And for that reason we were willing to do what we had to do to bring the facts to the open.

Q Did Allstate, who insured you, raise the issue of trying to settle the Slusher claim that was made against your son's estate?

A Yes.

Q Was that in the approximate time period of May and June of 1983?

A Around that time, I don't remember specifically.

Q Would you tell the jury how you felt, as you considered Allstate's proposal to try and settle the claim against Todd's estate?

A Well, we were relieved to have that settled, to know that since he'd been injured, that that was taken care of. I can't say more than that about it. It [128] was, in my mind at that time, an insurance matter, and while I was glad to have it taken care of, I don't know that that was uppermost on my mind.

Q Did you ever entertain the thought that that settlement should be interpreted by you or others of your opinion that Todd was at fault?

A No. No, I did not. I, rather, thought of it as a way of bringing peace of mind and saying that they were willing to do that, to give that to us.

Q When you say "they," you mean Allstate was willing to give that to you?

A Allstate, yes. That kind of peace of mind for what had happened.

Q Did you attempt, or were you willing to try and resolve this case with State Farm so there was no need to proceed with trial?

A Absolutely.

Q And did you join in your husband's decision to offer, or to make an offer of settlement to State Farm?

A Yes.

Q We've already looked at the letter. The letter is dated August 18 of 1983, from Mr. Bennett, and we read that while your husband was on the stand. You've had a chance to see that, haven't you?

[129] A I remember seeing it, yes.

Q Did that accurately represent your feelings at the time?

A I assume so. I can't remember the specific wording, but yes, I concur in that.

Q Was it your desire to settle that case at that time for $25,000?

A Yes, we would have done that.

Q And is that because you thought the wrongful death claim was only worth twenty-five?

A In our minds, at that very distressful time in our lives, it would have been an admission that their insured was responsible, and it would have given us some closure to that issue. Not that that's --

We had not necessarily put a dollar value. I don't think from the beginning we ever put a dollar value on that kind of matter, but we would have, we would have settled, because

we would have considered it an admission of responsibility on their part, or their insured's part, and we would have accepted.

Q Now, was it your understanding that if State Farm would have accepted that offer, and paid the twenty-five in August of 1983, would that have resolved all matters and put an end to everything?

A Yes.

[130] Q Was it your intention to continue on with the bad faith claim, had they paid the $25,000 at that time?

A No.

Q All right. Now, we've heard about the trial, we know the outcome of the trial. Are you aware, or were you aware at the time that there were offers made to even try and settle your claims through Mr. Bennett at the time of trial? Or do you even remember?

A I don't remember that. After the trial, yes. During the trial, no.

Q Okay. Now, after the trial, we know the result of that, did you attempt to ask State Farm to pay the full amounts of the judgment?

A Are you -- I'm sorry, after the trial?

Q After the trial, within a few months, did you ask them to pay the full amounts of the judgment?

A The judgment, yes.

Q And what was State Farm's response, as you remember?

A That they would pay the original amount of the claim, which was less than half of the amount of the judgment, and we did not agree to do that.

Q When you say the original amount, you mean the policy limit?

A Yes, the policy limit.

[131] Q Of twenty-five?

A Yes.

Q Was it your understanding that you had to give up the rest of your judgment in order to receive the twenty-five at that time?

A Yes.

Q At that point in time, Mrs. Ospital, did you entertain the possibility of executing or not executing on property owned by Mr. Campbell?

A It was a possibility. It was a hard decision for us. Of course our intent was never to cause more harm to other people, but there was anger, especially for the lack of accepting responsibility.

[132] * * *

Q Were you basically, by January of 1984, willing to entertain the concept of not executing on the property of Mr. Campbell if Mr. Campbell would pursue a bad faith claim?

A Not entertaining?

Q Yes. In other words, you were saying that previously you had entertained the possibility of executing on assets. By January of 1984, did you begin to entertain the possibility of not executing, or agreeing not to execute on his assets, if he would agree to pursue a bad faith claim and try and recover your judgments?

A Yes, because at that time we also had developed certain other feelings against State Farm for their reluctance to bring closure to this matter. Closure was very important to us. Going through court proceedings and all of that was not something we looked forward to. We spoke for Todd, we would continue to do that as long as he's portrayed in that light, but it [133] became obvious to us that State Farm was also not treating people fairly.

Q Did you concur with the decision to forego execution on the judgment in order, or upon the condition that Mr. Campbell would pursue the bad faith claim? By agreement in December of 1984?

A We did agree to the bad faith claim, yes. You're saying judgment against Mr. Campbell, yes.

Q All right. Now, was it your understanding at the time you entered into that agreement that you may never -- Well, what was your understanding regarding this agreement, whether you would ever see, or have your judgments paid?

A Of course, it was possible that they would not be paid and that we would never realize anything.

* * *

[135] * * *

CROSS EXAMINATION BY MR. BELNAP:

* * *

[136] * * *

Q Now, let me represent to you that your husband has testified that the trial took place in September, '83. Does that sound right to you?

A Yes, it does.

Q And I'll represent to you that a written judgment was signed by the court in December of '83. Do you recall if that's correct or not, as you recall it?

A Yes. Yes.

Q Okay. And then your husband has testified that he was in agreement with the concept of entering into an agreement with Mr. Campbell in about January of 1984, and had made a decision not to proceed against Mr. Campbell's assets, but to enter into an agreement. Do you recall that?

A Yes.

[137] Q Would you be in agreement with your husband's testimony that that time frame sounds correct to you?

A Yes.

Q Do you recall receiving a draft of a written agreement sometime in the spring of 1984 from your attorney, Mr. Humpherys?

A Regarding?

Q Regarding this concept, of entering into this agreement, in January of '84?

A Yes.

Q And were you in agreement with the basic terms of the draft agreement that was sent to you in the spring of 1984?

A Yes.

Q And I think the evidence is that written draft was in about May of '84. Does that sound correct to you, ma'am?

A I'm sorry, I don't remember.

Q Okay. Were you advised that on or about August of 1986, that State Farm had filed written papers indicating, without any reservation or strings attached, that the judgment entered in the favor of you and your husband would be paid, with interest and costs, if the appeal was not successful?

A I do recall that, yes.

[138] Q Okay. And did that happen, Mrs. Ospital?

A Was it paid? No.

Q Was it paid at the conclusion of the appeal?

A Yes, I assumed there was no choice.

Q So the answer is yes?

A Yes.

Q With interest and costs?

A Yes.

Q And that had been agreed to approximately, in writing, approximately three years prior to that?

A It seemed longer than that to me, but when it was paid in '89, yeah.

Q And it had been agreed to several years before that.
A That's right.

* * *

[140] * * *

(The jury left the courtroom.)

THE COURT: Let the record show the jury is out of the courtroom. We'll be in recess.

(Brief recess.)

MR. BELNAP: We had a hearing on an issue that was of record a day or two ago regarding interjecting issues of settlement, and I'm not going to go back through that, but that's one of the things I was referring to when I asked for a preservation of objection.

The other thing that I was referring to, Your Honor, that I don't think a record's been made on, is we had a bench conference yesterday just before Mr. Slusher, or during Slusher -- I can't recall if it was [141] in his testimony or just before his testimony--where we had a bench conference, and there were discussions with the court as to what the parameters would be in terms of testimony from Slusher and Ospital. And I just wanted to preserve my objection for the record.

I realize the scope the court ruled, but in terms of the relevancy of any of the testimony of Mr. and Mrs. Ospital and Mr. Slusher about their feelings about State Farm, they're not, those aren't the controlling causes of action in this case. It is Mr. Campbell, and I think we made ourselves clear, but I just wanted to state that for the record so it was clear on this, as to the basis of the objection. Thanks for that opportunity.

MR. HUMPHERYS: May I make a record, as well?

THE COURT: You may.

MR. HUMPHERYS: The issue which plaintiffs contend have been raised include opening statements and some of the cross examination where State Farm has raised the issue of the motivation of the parties for entering into the 1984 agreement, the motivation and intentions at the June of 1983 agreement pertaining to the possible bad faith claim, their motivations regarding their offers of settlement, or their intentions regarding the possible executions. And State [142] Farm has also raised the issue of its motivation, its propriety of making offers, of posting supersedeas bonds, of encouraging an agreement between or among Campbell and Slusher and Ospitals.

And all of this information which has been explored gives, not only the background, but it also allows us to refute some of the implications, and suggestions and arguments that counsel has made, or appears to be making.

And finally, it also goes to the general effect of what State Farm did post trial, and the effect it had on the parties, which is relevant for punitive damage purposes.

THE COURT: Well, I'm not going to -- I think my understanding of what Mr. Belnap's objection was, and in just preserving the record, went to our discussion about opening statements. I was pretty clear in my mind that a strenuous objection was made by plaintiff to keep the post '94 material out of settlement discussions, it was something he resisted, and I thought forewarned both the defendant as well as the court that if the court allowed the opening statement that went into that subject, that he would feel like the door had been opened.

And I nevertheless felt, because of [143] Mr. Belnap's strenuous argument, that he wanted to go into it, that it was appropriately raised, but recognized that it would widen the issues, and I ruled accordingly. And that's why I've allowed that testimony to come in, and what I understood was the

substance of the objections, and I overruled them based on my understanding of that ruling, which is already on record.

MR. HUMPHERYS: And the record should note, as well, we have been restricted in the scope of what evidence we were going to present as a result of all of these motions and conferences.

* * * *

EXCERPTS OF TRIAL TESTIMONY
GARR M. OVARD, JUNE 19, 1996

[Vol. 27, R. 10282, commencing at p. 4]

GARR M. OVARD called as a witness by and on behalf of the Defendant, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION BY MR. BELNAP:

* * *

Q Will you tell us what your full name is?
A My name is Garr Martin Ovard.
Q And what city do you live in?
A I live in Sandy, Utah.
Q Who are you employed by, Mr. Ovard?
A I work for the state of Utah, the insurance department.
Q Mr. Ovard, are you here pursuant to a subpoena?
[5] A I am.

Q And like Mr. Rogers from Illinois, are you, are we paying you to be here, or compensating you in any way, other than the subpoena that you received?

A I don't know Mr. Rogers from Illinois, but no.

Q Okay.

A I'm here at your request, but I'm neutral.

Q Mr. Ovard, I want the jury just to briefly know about your background. What is your educational background after high school?

A I graduated from the University of Utah with a degree in geography and a minor in languages, linguistics. I have served as an officer in the Utah National Guard, where I served as an engineer officer and helicopter pilot for a number of years. And I worked as a field trooper for the Utah Highway Patrol in Cache County from 1975 until 1981, and then I

worked as an insurance claims supervisor for Nationwide Insurance from 1981 until 1991. And then I've worked for the Utah Department of Insurance.

Q Since --

A To present.

Q Since '91?

A Since -- To this time.

[6] Q Okay. And at the department of insurance, Mr. Ovard, approximately how many employees are there in the whole department, if you know?

A We've had some recent retirees and some recent additions. It's somewhere between, I would guess fifty-five to sixty people.

Q Now, in the department, is the department divided into different sections?

A It is.

Q What sections are there in the department?

A Well, there's the administrative section that takes care of the functions of the office of the commissioner, there's a solvency section, which takes care of companies that are liquidated, that fall into the jurisdiction of the state of Utah, there's the licensing section, where we license individual agents and companies, entities, agencies, there's the rates and forms department that's responsible for seeing that the documents are correct, there's the financial examination section.

Q Are they separate from solvency?

A They are.

Q Okay.

A And there is a section for consumer service, and a section for compliance and enforcement, and a, [7] actually a computer section, which is part of the administration. And of course we have a fraud unit, as well.

Q Why do you have a fraud unit, by your understanding?

A Well, I worked with insurance fraud for quite a number of years, and somewhere, it's estimated somewhere between 20 to 25 percent of all insurance monies that are generated are used to pay fraudulent claims.

Q Now, which section of the department do you work in?

A I work in consumer services.

Q All right. And in the consumer services department, can you describe to the jury generally what your job function is.

A Well, sometimes I wonder myself. What we do is, we respond to inquiries from individuals, companies, corporations, attorneys, doctors, dentists, anyone that has a question regarding their insurance.

Q And are some of these calls that you take -- When you say questions, are some of them complaints, as well?

A Yes. Oh, certainly.

Q Now, in this particular case, Mr. Ovard, have [8] you made yourself available and sat down with each side's attorneys to speak with them to the extent that there's been a desire to do so?

A I have.

Q And have you met with the plaintiffs' attorneys privately, and been willing to speak with them?

A Yes, certainly.

Q Do you, yourself, can you tell us whether or not you appear here today trying to take any particular side in this case?

A No, no side. Part of the department's function is to be in the middle. We function to ensure that there's a good insurance market in the state of Utah, and that people are treated fairly, and the companies are treated fairly. And so we're dead neutral in all issues.

Q Now, in the consumer department, is that divided up where you have responsibility, based on an alphabetical arrangement, for certain insurance companies that do business here in the state of Utah?

A It is.

Q And in your area of the alphabet that's assigned to you, is State Farm insurance one of the companies that you're responsible for in the consumer [9] department?

A It is.

Q In that connection, if a person calls in to the insurance commissioner's office with a question, an inquiry, or a complaint about State Farm, are you the person, assuming you're in town or whatever, that they would speak to, Mr. Ovard?

A I am.

Q Can you tell us, just briefly, what the process is. If a person verbally calls in and expresses a complaint and a concern with State Farm, what are the steps that you take to deal with that?

A Well, in regards to a complaint, if someone calls on the phone, or drops by, or writes me a letter, generally they'll call. That's the bulk of our transactions. I identify myself and ask them to explain the problem in their own words, and I just listen.

If it turns out, during the course of our conversation, that I need to give them some direction, or we need to take other action, then we move on from there.

Q Now, if you determine in the course of that conversation that it's not a situation where you can just answer their questions -- And I'm getting ahead of myself, perhaps.

[10] Do some of the calls that you receive, can you solve them right there on the phone, by explaining the procedure to someone who may not understand it?

A Quite a few of them. Oftentimes people call up, and insurance is not a familiar thing to most people. Everybody has insurance policies of some kind, but most of us, myself included, I have insurance policies, in a drawer at home in a safe place, and I don't recall the last time I physically read one of my insurance policies. And it's a complex issue. There are a lot of things that are just not familiar to people. They just don't understand.

Q Now, if you get a person that you get past the discussion and question-and-answer phase, and you believe that this person has a complaint that you perceive as a complaint and that needs to be investigated, what is the next step that you take in the consumer department?

A Well, some complaints can be resolved simply by contacting the parties involved, just by the nature of them, and discussing it, explaining it to, what the rules are in the state of Utah. Not all insurance companies, not all attorneys, not all individuals, corporations, are familiar with the rules that regulate the industry.

[11] And sometimes we might call either the agent or the adjuster or the manager or the supervisor, and discuss with them, point out to them the nuances of the law. And very often we can just resolve it at that point in time.

If it turns out that it's something that might involve a breach of, a serious breach of either the law or regulations, insurance regulations, we would send out a formal complaint, take their name and address, we mail them a form for them to fill out, putting in writing their problem. Then they send it in to us, we review that, and that complaint, a copy of that is sent to the individual they're complaining against.

And it's not necessarily a consumer. It might be one company is complaining about another company, or it might be an agent is complaining about an insurance company, or

might be a company complaining about an individual. Those are generally the three groups. Individuals, agents, and companies that we deal with.

Q Now, in a situation where you receive a call and send out a written form to a person that has an insurance dispute or concern, then would they then fill that out and send it back to you if it was to that [12] stage?

A Correct.

Q And then what do you do with it at that point?

A Well, as I mentioned just a moment ago, we review those to see if, once it's in writing, that there are elements that need to be addressed. We're not all Ernest Hemingway, and some people have a problem, they have a situation, they don't know how to express it. Once in a while we have to call the individual and help them make it clear so that we can resolve the problem.

Q Now, in this process, Mr. Ovard, do you take, and have you taken, in the years that you've been assigned to the alphabet that involves State Farm, thousands of telephone calls?

A Involving State Farm, or involving all companies?

Q No, just involving all companies?

A Involving all companies, certainly.

Q Okay. Now, do you have a way of keeping track of the approximate number of calls that are taken and forwarded to you in this capacity that you've talked about in your job?

A We do.

Q And I've put up on the screen, here, contacts [13] and recoveries. Is this column the number of calls that you fielded in each of those years, in 1996 up through May?

A Correct, it is.

Q Now, as a result of the calls that have been taken by you, have you been able to resolve and realize for individuals that have been in contact with you monies, in the resolution process, of whatever concerns they might have?

A Yes.

Q And is that listed in the far right-hand column?

A It is.

Q It's been claimed in this case by one of the plaintiffs' experts that insurance commissioners' offices really don't do their job, or don't know how to do their job. With respect to your job in the consumer department, do you do anything else each day, other than deal with complaints and inquiries about insurance?

A Well, on some occasions we attend industry seminars, and we meet with companies. And sure, we do other things. But on a day-to-day basis, that's all I do. And the others that work with me in my division, that's all we do. We talk to people that have problems.

Q Now, at the written complaint stage, when you [14] get a written complaint in and have an understanding of what it is, then you send it out, do you send it out to the insurance company for them to respond?

A Well, you need to understand, it's not always an insurance company that's being complained about.

Q But in that category. Let's focus.

A Whoever they're complaining about, certainly we send it out to the individual. There are a lot of licensees, and on occasion we send complaints to non-licensees, as a courtesy to the individuals. We don't license glass companies, but we get a lot of complaints about glass companies. And we don't license attorneys, and we get a lot of complaints about attorneys. And as a courtesy we will send out complaints.

Q Okay. If we were to focus this morning on complaints that originated from an insurance policy holder against an insurance company --

A Sure.

Q -- when that written complaint comes in does it then go out to the insurance company?

A It does.

Q And do you expect to receive a response to that from the insurance company?

A The law requires that we receive a response [15] within fifteen days, or there are penalties attached.

Q And if the response is not given, are there procedures that you would call a forfeiture procedure?

A There are. And companies vary wildly. Some companies respond almost immediately, and some drag their feet and are very, very poor to respond, and some will not respond unless we go through a complete forfeiture proceeding and actually cost them money.

And some companies, if we ever send them a question, if we ever question anything they do, then they have an attorney contact us, and it just takes an endless amount of time to get those resolved.

Q Now, having given that gambit of experience, just in summary fashion, with a variety of companies, can you tell the jury what your experience has been with State Farm in cases where a written complaint has been sent to them? What is their normal and customary practice, in terms of responding?

A Their normal and customary practice is good. Very good.

Q Do they, when they respond to you, do they have an attorney call you back, typically?

A No. Well, one of the individuals that I deal with at State Farm, if there is a problem, happens to be an attorney, but he doesn't call me in an attorney [16] capacity.

Q Okay. And have you ever had a problem with them calling, or responding back within the time required under the law?

A Once or twice, and it's been inadvertent.

Q And Mr. Ovard, after a response is received back from the insurance company, then what is the next step, if we're dealing in this subset of complaints that deal with insurance versus policy holder?

A We review the response received from the company against the complaint made by the individual or entity making the complaint, to see if there's any substance to the allegations, and we weigh that against state law and insurance regulations, and obviously court decisions that we're familiar with.

Q Now, if you'd need additional information after that step, can you ask for it from the insurance company?

A Absolutely.

Q And when you've done that with State Farm, can you tell the jury what your experience has been with State Farm in terms of their willingness to supply information that's requested?

A They've generally been good.

Q Now, ultimately does there come a point in [17] time when, if you consider that a complaint is valid in that process that's brought by the person that has the insurance policy, does your department have the authority to tell an insurance company that they need to do something about that?

A It depends on if it's within our jurisdiction. The legislature has defined certain areas that we're responsible for, and other areas they haven't given us --

Q What is within your jurisdiction to do?

A Well, essentially the items of code and the unfair claims settlement practices, their marketing, their financial status. We spend an awfully lot of time making certain that insurance companies are being wise with the money that they take in, so that they're solvent.

Q Now, if it deals within this area of jurisdiction that you've talked about, does your department in the consumer services and/or compliance and enforcement, do you have the authority to require certain actions?

A We do.

Q And one of the plaintiffs' witnesses have indicated that he made a search of reported cases, Mr. Ovard, that would show up in legal law reporter [18] arrangements, and could find only very limited record in that regard. And I'd like to talk, or have you address for the jury, whether or not these actions that are taken by your department, whether the bulk of them would or would not be in a reported law case.

A I'm not an attorney, but to my knowledge the only ones that would be reported would be appellate court decisions. Ninety-nine percent of what we do is done in a regulatory fashion, and other than docketing court cases, most of the action that we take would not be available anywhere other than our department and/or another insurance department.

Q Now, in a regulatory action, is that, if I were to use the words "administrative proceedings against a person," is that equal to a regulatory action?

A It is.

Q Let's say that you've come to a decision, as a department, that there needs to be some action taken against a particular insurance company for some complaint that's come in. In terms of the process of handling that, can you walk us through the stages that that would take before it would ever become a court case?

A Well, initially, if we have determined that there's something inappropriate that's happened, there's [19] many, many things that might occur. It might involve, depending on the situation, it might involve speaking with the individual or

entity, it might involve -- And that could be an admonition to not do what they've done, or to do things differently, verbally.

We may do that in writing. We may censure or admonish them in writing privately, we may publish it in industry publications that we put out every so often. It may be that we levy forfeitures against them. Our forfeitures can be astronomical. They range from hundreds of dollars up to $10,000 a day, up to stopping the company from selling policies, but paying their claims. There are all kinds of things that we're able to do against companies.

If they, ninety, approximately 90 percent of the time, maybe perhaps more, we meet with the individuals. And we have quite a few attorneys in our department, they'll meet with the individuals or the entities, and explain to them what we have decided that they have done, and we will ask them to sign a stipulated agreement.

And the only time that we'd ever go into a courtroom situation is if they disagree with the stipulated agreement. And then we would be forced to take them into the courts, which we do on occasion.

[20] Q Mr. Ovard, in your experience at the department, have you been involved with a particular company where they wouldn't cooperate in this administrative process, and that required ultimately a court proceeding to obtain an order against them?

A Personally, yes.

Q And in your investigation, in that process that led up to that -- Well, let me rephrase it. As a result of your investigation, was there an order entered against a company that was doing business, or trying to do business here in the state of Utah?

A There was.

Q What was the nature of that order? What would you call it?

A Cease and desist.

Q So you -- Let me rephrase it. Did the department ultimately request and receive an order putting that company out of business in Utah?

A We did.

Q Now, in addition to talking to people and attending seminars, on a daily basis, do you receive and review information from other sources about insurance companies that you are involved with here in the state of Utah?

A I do.

[21] Q What sources of information do you get on that? Where do they come from?

A Well, there's so much information, I brought a list, I could read some of them to you. But I don't know if I could recall them all from memory.

Q Just a few of them, if you could give us the high points.

A Well, probably one of the best sources is we receive E-mail daily from the National Association of Insurance Commissioners, and they have a library that compiles information regarding insurance companies and insurance actions from around the world, and we receive a daily update of activities that are happening.

There are so many journals and newspapers in the industry, that oftentimes it's impossible to read all of them. But if -- When they'll come across my desk, they'll usually come across in the form of someone's excerpted a page out of them. Occasionally I'll receive the full journals, but there's an awful lot of information to review.

Q Now, in connection with that kind of process that you've talked about, just as an example, did you receive, in the reading materials that you regularly review, an article about State Farm and a market conduct examination that was done with State Farm in the state [22] of Colorado?

A I did.

Q Can you tell the jury what a market conduct examination is?

MR. HUMPHERYS: Your Honor, may we approach the bench?

THE COURT: You may.

(Side bar conference held out of the hearing of the jury.)

Q (BY MR. BELNAP) Mr. Ovard, did you find out about a market conduct -- Let me first say, what is a market conduct examination?

A Well, if -- There are a couple of kinds, actually. We do them routinely, and we also do them as needed. Market conduct examination is an examination of a company's records. Generally, if it's routine, it's just a broad-based examination of lots of documents. And if it is a specific examination it may be on a particular file, or a particular class of files or something.

But we -- And all state insurance departments do them routinely. We rotate through the industry, and are in a constant state of examining everybody. There's a lot of insurance companies, so we obviously can't do every one every year, but if a [23] problem comes up, the market conduct examiners will look into a specific issue.

And it may be that they would physically go to a company's premises and examine their documents. And at times we go and seal the building, just escort them out. We may have the police there and lock their doors and just go through, much as bank examiners do. But generally it's a fairly non-hostile thing.

Q Mr. Ovard, one of the plaintiffs' witnesses has testified that insurance departments are underfunded, and that's one of the reasons they can't do their job. With respect to market conduct, can you tell us, in the state of Utah, who the charges are passed to if a market conduct examination is done?

A The companies pay for the market conduct exams.

Q The insurance company?

A The entities being examined.

Q Now, going to the question that I asked you, and I just don't want to get into the details of the Colorado situation, but did you become aware that the insurance commissioner's office in the state of Colorado performed a market conduct study on State Farm?

A I did.

Q And after becoming aware of that, did you [24] take it upon yourself to contact State Farm and ask them about the subject of the matters in that market conduct study?

A I did.

Q And did they respond to you?

A They did.

Q Did they come in and meet with you?

A They did. They offered to bring the entire exam if we wanted it, and they offered to show us everything that Colorado had done.

Q Okay. Now, in the course of taking calls and complaints, I'd like to approach you and show you what we've marked as Exhibit 151-D.

MR. BELNAP: And counsel, this is the state insurance reports.

MR. HUMPHERYS: What years?

MR. BELNAP: '95, '94, and '93.

Q (BY MR. BELNAP) Can you identify for the jury what this three-page Exhibit 151-D consists of?

A Well, this is the copies of the documents that I gave to Mr. Humpherys and Mr. Campbell and to yourself that reflect -- Once a year the legislature's mandated that our department will generate a brochure, and the brochure reflects information about private passenger automobiles. We do a similar one for [25] homeowners, that gives a little bit of an idea --

It's actually a two-part. The first part gives some rate information, so that if you happen to be a single male age 20, or single female age 20, or married male or female age 37, or married male or female age 66, and it outlines in the brochure that it's given a, I don't recall, I believe it's a three-year-old standard auto that's garaged in Salt Lake County, no discounts, such as multi car or special coverages.

It gives an idea, so that you can look at the top twenty insurers in the state of Utah and get an idea of what they charge, and just go down the chart. And if you fit into one of these categories you can probably get an idea if one would be more expensive than the other.

The second part of the chart lists written premiums, which is basically how much business they're doing, valid complaints that we've received. Valid complaints -- We have three kinds of complaints. Basically unfounded complaints, or unjustified complaints, questionable complaints, where it's hard to tell whether there's been, who's right, and the third category would be justified, or someone's absolutely wrong.

And complaint ratio per hundred thousand [26] written premium, loss ratio, expense ratio, combined loss and expense ratio. The brochure explains a little bit of what these things are, but to people that are not familiar with it, the last three columns have to do with the health of the company.

Obviously, if they're paying out more money in claims than they're taking in continuously, then it won't do you any good to buy insurance cheaply with that company, because they may not be there by the time you need a claim paid.

Q Mr. Ovard, are these records that are kept in the regular course of the insurance department's business, and published as a government record each year?

A They are.

Q Now --

MR. BELNAP: I'd move for the admission of 151, Your Honor.

THE COURT: Any objection?

MR. HUMPHERYS: No objection. Received.

(WHEREUPON Exhibit Number 151 was received into evidence.)

Q (BY MR. BELNAP) Starting -- And these just consist of the auto figures, do they not?

A Correct.

[27] Q Okay, starting back in 1993, does it indicate a complaint ratio for State Farm, and a number of complaints?

A Well, it doesn't indicate a number of complaints in that particular year, but it does indicate a complaint ratio.

Q And what was the complaint ratio in 1993 for State Farm?

A Per 100,000 written premium, it was .008.

Q And for 1994? In 1994, does it indicate how many valid complaints were listed against State Farm?

A Valid and questionable complaints were four, and the complaint ratio per 100,000 written premium was .031.

Q And Mr. Ovard, in 1995, does it indicate the complaints, the valid complaints of State Farm?

A It does.

Q And how many were there in '95?

A Twenty-one.

Q And --

A Valid and questionable.

Q If you look at -- And in that year, Mr. Ovard, do you compare the number of complaints against how much premium was written in Utah?

A Correct.

[28] Q Does that then yield you the ratio?

A It does.

Q If I were to represent to you that this, which the jury's seen before, is a to-scale bar graph based upon that complaint ratio, with State Farm being in red, does that appear to be correct proportionately, given the amount of premiums sold, to the number of complaints, related to the other companies on the list?

A Which year?

Q This is '95. I'm not asking you to try and tabulate that, or draw it in your mind, but does spatially, or size-wise, does it appear to be approximately correct, given the volume of business that State Farm does?

A It does.

Q And these companies that are on this chart, what percentage of the automobile insurance business would be represented by this group of companies in the state of Utah, approximately?

A They're probably somewhere between 80 and 100 percent of the market.

* * *

[30] * * *

Q Mr. Ovard, with respect to talking to this jury, do you, from your experience, have an [31] understanding of whether or not State Farm is a perfect company, from your factual experience in dealing with them?

A I don't know of any perfect companies.

Q I'd like to ask you, Mr. Ovard, from your dealing with and receiving telephone calls over the years and your discussions with State Farm and the people that you've received phone calls from, the information that you've gotten from computer printouts, or this E-mail I think you called it, other trade journals and the like, do you believe that if there was a pattern or practice of State Farm cheating its insureds and people that are claiming against its insureds, that you would know about that?

MR. HUMPHERYS: Your Honor, I object. Hold on just a minute. This man is a government regulator, he has just come in and said that he's going to further investigate this case. He has a direct conflict of interest in giving any opinions in favor of State Farm. And I object to that. That is a legal conflict of interest.

MR. BELNAP: Your Honor, I object to that. That -- And let me state why that is not true, if I may follow up with a couple of questions.

THE COURT: All right, without him asking, [32] answering that question?

MR. BELNAP: Certainly.

THE COURT: All right.

Q (BY MR. BELNAP) Mr. Ovard, will you be doing an examination of State Farm, or will it be done by a different department within your insurance department offices, if that occurs?

A It would be other people. I wouldn't be -- I'm not in that department. I'm not in that division.

Q Would that be in the compliance and enforcement division?

A That is correct.

Q And does this division, within the jurisdiction that you talked about, do they have authority to levy forfeitures?

A They do.

Q And does that authority proceed up to the authority to even restrict the ability to do business in the state of Utah?

A It extends -- The authority extends to seizing the company and liquidating it.

Q Based upon this objection, Mr. Ovard, what is your belief about, from your experience, from what you've read and people that you've talked to, what is your belief about whether there's a pattern or practice?

[33] MR. HUMPHERYS: Your Honor, I have the same objection. He's here as a representative of the insurance

commission, and it doesn't matter whether it's he or another individual that's taking action. It is a direct and legal conflict of interest.

THE COURT: I don't think that's an evidentiary objection for me to rule. I'm going to overrule that objection and allow him to answer it.

Q (BY MR. BELNAP) What's your, call it opinion -- I could rephrase it and call it your experience, Mr. Ovard.

A There's been absolutely no evidence of any pattern of, that you've suggested.

Q Now, there's been claims in this case that don't have anything to do with the Campbell accident, which was a third-party case, but there's been witnesses who have talked about things such as the use of recycled auto parts from crashed vehicles, the use of after-market parts, and the use of appearance allowances. Can you tell the jury, under the laws of the state of Utah, and the Unfair Claims Practices Act, whether or not it is appropriate for an insurance company to use those types of approaches in the repairing of automobiles?

MR. HUMPHERYS: Objection, Your Honor, as it [34] calls for a legal conclusion as it relates to Utah law. He may testify as it relates to the regulations, but not as it relates to Utah law.

MR. BELNAP: My question would be as to the unfair claims practice, as I mentioned.

THE WITNESS: I have no conflict. Those are usual and customary practices in all companies that I know of.

Q (BY MR. BELNAP) And is that allowed for under the Unfair Claims Practices Act?

A It is. There are some restrictions on most things, and those things are regulated to a degree. The companies are required to list on their estimates whether after-market parts are used, and the shops are required -- although we don't regulate body shops, we get a lot of complaints about them

-- but they're required, the parts are required to have clearly marked that they are after market.

Q In the course of the work of your department, have there been occasions when your department has required the chief officer of an insurance company that's doing business here in the state of Utah to travel in from out of state and appear before your department and answer questions?

A On occasion.

[35] * * *

CROSS EXAMINATION BY MR. HUMPHERYS:

Q Mr. Ovard, let me just have you confirm that whenever you sense, or feel there's a violation of the unfair claims practices, you investigate it, don't you?

A We try to, certainly.

Q When you say "try," are there times when you don't?

A There are times we're unable.

Q Why?

A That's a lot of question. On occasion we're just thwarted because people resist us, companies resist us.

* * *

[36] * * *

Q What I'd like to do is just have us focus for a minute on the type of investigation you like to do. Obviously, whenever you sense and feel there's a serious violation, you like to investigate, don't you?

A Like to.

* * *

[57] * * *

Q Did you ever call the Campbells to find out what had happened to them, or the Ospitals, or Mr. Slusher?

A We don't get involved when there's ongoing litigation. We never have. It's a policy. Almost every commissioner that I know of has maintained that policy.

Q Have you ever talked to Ms. Bird, who said, likewise, she was requested to alter reports?

A I'm sorry, but I'm getting frustrated here, because I've indicated to you that we don't get involved until after the litigation is over. I don't know how to say it any other way.

Q Let me see if I can rephrase it. Ms. Bird has testified about having to alter, or being requested to alter documents, totally unrelated to the Campbell file. Have you investigated that?

A There hasn't --

Q There hasn't been a complaint.

A Yes, and I've never heard.

Q You never heard of that?

[58] A I never heard of it until you just mentioned it.

* * *

[59] * * *

Q I appreciate you don't. But the reason I'm asking this, is do you recall in your deposition, when I asked whether or not the Utah Insurance Department, and you specifically, would be in a position, really, to know whether there were wrongful actions and violations of the unfair claims practices going on, you said that you personally thought you were better than anyone in the state to know of these things. Do you remember saying that?

A I still feel that way.

Q Okay. So you would know more than anyone else in the state, according to your personal view.

A Obviously I don't know more than anyone in the state. And I don't carry that as a personal view.

Q Well, let's see what you said in your deposition.

A If you're talking about insurance complaints. I think that I have a better access to information than anyone in the state, because I talk to thousands of people. I do it eight hours a day, and I do it five days a week.

[60] Q Let's look at your deposition. I refer you to page 58. Can you see it from there? I talked about how sometimes there's under staffing, under funding and so forth. And then I asked, "Are you in a position to really know whether there is a pattern and practice regarding improper claims activity in State Farm?"

Mr. Brown, who was a California attorney representing State Farm at the time, with us in the deposition, made this comment, and then you said, "Probably more so than anybody in the state, I would personally think."

A I feel that is an accurate statement at this time.

Q Okay.

A That's all I deal with.

* * *

Q How many lawsuits are there against State Farm that have alleged pattern and practice? Do you know of any besides this one?

A I wouldn't have access to that information. I don't track that information.

Q Do you know the outcome of any case where State Farm has been alleged, in nationwide pattern and [61] practices, of violating unfair claims practices?

A There have been some, I'm sure.

Q No, I'm asking you, are you aware of them?

A I can't think of one that comes to mind.

Q Are you aware of class actions where literally millions of people have brought lawsuits against State Farm due to violations of fair claims practices?

A I'm not aware of any right now. I'm sure there have been some. I just deal with the state of Utah.

Q Let me go to your deposition, page 39. I was asking you about these same questions. I asked you here on line 14, "Has there been any study done to determine whether the

number of lawsuits would correspond with the number of complaints which you have had?" Referring to the complaints of the insurance department.

And you said, "I wouldn't have knowledge of that. I wouldn't know."

I then asked, "Would you be the first to admit that not all of the complaints or violations of the unfair claims practice are accounted for in your system?"

Answer, "Oh, absolutely. We recognize that people that contact us are those that are aware that we [62] are there, and that feel motivated to call. We have no knowledge of people that don't call, and events that happen."

Question. "Have you made any determination to what degree or extent people are aware of what services you offer?"

"No, I have no way of knowing."

Question. "So that's a very unknown area, how many other complaints there would be other than the twenty-one, for example, in 1995?"

"Correct. There could be thousands, there could be zero. I have no way of knowing."

Now, we've heard, and there's been an exhibit introduced through State Farm's counsel, that there were only twenty-one complaints in all of 1995 against State Farm Auto. Are you suggesting to this jury that that is all of the violations of the Unfair Claims Practices Act?

MR. BELNAP: Your Honor, I'm going to object for lack of foundation, misstates his testimony that those are all violations of the act.

THE COURT: Reframe the question.

Q (BY MR. HUMPHERYS) Okay, let me ask you. Are those twenty-one valid complaints that are in there, would they be considered violations of the act?

[63] A Most of them would not.

Q All right, then let's say --

A Most of them, being probably 90 to 95 percent of them would have nothing to do with the Unfair Claims Settlement Practices Act. Most of them have to do with premium, most of them have to do with agents dealing with their people. The claims part of it --

Q Less than ten?

A Less than 10 percent?

Q No, less than ten complaints, valid complaints, then.

A Those valid and questionable complaints that you're referring to, less than ten? Very likely.

Q All right. So are you suggesting to this jury, Mr. Ovard, that less than ten valid complaints, as violations of the Unfair Claims Practices Act, occurred in Utah in 1995 as it relates to State Farm?

A Oh, probably. Well, not probably. Very likely.

Q Very likely that's all there were?

A Very likely.

Q That's all there were? Is that what you're saying?

A We don't see from State Farm violations of the Unfair Claims Settlement Practices Act. There are [64] occasionally violations, but they're one of the better companies that we deal with. There are companies -- you saw the bar graph -- that we have astronomical problems with. State Farm is not one of those companies. I'm sorry, but they're not.

* * *

[65] * * *

Q How many documents and files are you aware of where State Farm employees have falsified portions of the file.

A I'm not familiar with a single instance. I'm familiar with this particular allegation in this case, and it's the only one I'm aware of.

Q How many files are you familiar with where State Farm has removed documents from the file?

A I don't know of a single instance. There's never been an allegation to our department that I know of, of that.

* * *

[67] * * *

Q Are you aware of what documents -- Or is proper to destroy documents which are subject to discovery in a bad faith action?

A Oh I think that would be a heinous act.

* * *

Q And yet you can stand here and say to this jury that, in your opinion there is no pattern or practice, or any kind of widespread violations of wrongful unfair claims practices.

A The only thing I can say to this jury is that I deal with, at the last count, there are 693 companies doing business, property and casualty companies doing business, a lot of those are auto companies. And of [68] those I deal with, State Farm has been the most straightforward and willing to cooperate with the insurance department, of all the companies I deal with. I don't know why they are, but they are.

They're the easiest to get along with, they're the most cooperative, and they constantly are asking our direction to make sure they don't violate the Utah laws. I don't know why that is. I don't have a clue.

Q Okay.

A And there is no indication, and has been no indication of the things that are alleged of some widespread pattern. I have seen nothing in the literature from the various states, the various insurance departments, that would indicate that to be. I don't know why.

Q Okay.

A If it's there, we'd like to find it. We'd like to grab them by the throat and shake them. There are companies that I would like to throw down on the ground and boot out of the state. State Farm is not one of those.

* * *

[74] * * *

Q Now, do you recall admitting to me that you do not resolve factual disputes, when there are? That is between a claimant and an insurance company?

A Well, certainly.

Q And you don't even -- Well, it's not between -- Well, I guess it is, sure. An insured or a claimant against an insurance company.

A Sure.

Q You don't resolve those, do you?

A We try to mediate those to a degree, but very [75] often we can't resolve those.

Q Right, and you refer them out to counsel or to someone else, or you --

A We don't refer them. We give them as many options as we can.

Q Including go see a lawyer?

A Well, we don't tell them specifically. Very seldom to go see a lawyer. We tell them that the bar association is available for free advice, and give them the way to contact them. If it's a minor matter, we explain to them the procedure for small claims court and so forth.

Q And you don't resolve issues whether or not someone has been fairly paid, do you?

A Generally not. Sometimes auto evaluations, we can give them some directions on how to proceed.

Q Other than that, you don't.

A Generally not.

Q All right. And have you ever disciplined State Farm for anything?

A Have we ever? They have had no docketed actions by complaints, and enforcement, which means they haven't been disciplined by them. There have been numerous occasions where I have taken exception with what they've done, and have had numerous disagreements [76] with them, as I do with all companies. I argue with all companies almost on a daily basis.

Q But you've taken no disciplinary actions against State Farm; isn't that right?

A They haven't had any violations that would merit that, that we know of.

Q That you're aware of.

A Sure.

Q Now let's put this in context. How many insurance companies are there in Utah that write property and casualty?

A The last count that I was able to determine was 693.

Q Six hundred?

A And 93. Correct.

Q And you regulate approximately half of those?

A Correct.

Q And there are only two regulators, aren't there, that regulate those 600 insurance companies.

A Well, there's certainly more than two.

Q I'm talking about the property-casualty.

A Yeah, I understand. There's a whole raft of individuals that are responsible for taking calls, sifting through them, and they sift them through -- But there's probably, in our department, ten, twelve people [77] that are actually involved.

Q Didn't you tell me there were only two regulators in the consumer protection division that regulate those 600 companies?

A No, I told you there were two examiners.

Q Two examiners, and you're one of them?

A This is a problem we deal with every day. It's a matter of semantics, and I apologize.

Q And you deal with all of the millions of claims every year that are throughout the state, correct?

A I deal with the verbal, written, and drop-in complaints that come in.

Q All of the agent complaints, selling and marketing?

A Sure.

Q All of the claims?

A Sure.

Q Underwriting? Or do you get involved in that, some of it?

A Sure.

Q All of those. The reinsurances, self-funded plans, the risk management, anything that has to do with property and casualty companies, right?

A You bet.

[78] Q And you take all of the companies from, what is it, N to Z?

A N to Z, correct.

Q You deal with all the public adjusters in this area?

A We do.

Q And you deal with all of the independent adjusters, as well.

A Correct.

Q And in all of this, there are only two of you in your department that regulates, right?

A Sure.

Q You don't read the manuals, have you?

A I'm sorry?

Q You don't read manuals, do you?

A No. When I was working in the industry I obviously read the manuals of the company I worked for.

Q Let me cover that. You worked for Nationwide.

A I did.

Q You were fired from Nationwide.

A I was.

Q And you did not have employment for about ten or eleven months while you were seeking a job?

A Well, I was working with a friend. We were [79] trying to set up a -- He was in the head hunting business, and we were trying to set up a new line of head hunting for medical services people.

Q Then you were hired by Harold Yancey, right?

A Correct.

Q And he's a paid expert in this case on behalf of State Farm?

A I'd like to comment, if I may.

Q I'm not asking for comments.

A Sure.

Q We need to get done. We've got a break, here, and I've already gone longer, and part of it is because you're expanding a lot of the answers.

A Sorry.

Q I want to try and get through, if that's all right. It's improper to have incentive programs, isn't it, to try and pay less?

A No, I believe that's a violation of law.

Q Right, that's improper, then. Are you aware of pride month that's at State Farm?

A I'm not.

Q Are you aware of the cost savings reports, where they keep track of how much they can save off of claims?

A I'm not.

[80] Q Are you aware of the PP&R program?

A You've mentioned that before, and specifically I'm not.

Q You've not read any of the manuals, have you?

A State Farm manuals? I don't believe I have.

Q And yet you would be in a position better than anyone else in the state to know whether there are violations occurring at State Farm; is that right?

A I would think so.

Q Let me cover a few things that you said to Mr. Belnap, or in response to his questions.

A Sure.

Q You said that State Farm is usually very good about giving the information you need, and we saw what information they gave you in the Campbell case in response to your inquiry.

Did you know that Ms. Bird has testified that when she was required to respond to a complaint by the insurance, or to the insurance department, that she would put in there the full picture, and that as that answer got sifted through the up line management, that much of the derogatory comments that were true but would have hurt State Farm's position were taken out before it was sent to you?

A Not aware of that, obviously.

* * *

[82] * * *

Q Now, Mr. Moskalski testified here previously that there's not been a market study done in Utah as long as he has been aware. You would agree with that, don't you?

A I'm not sure what you refer to by a market study.

Q Or market conduct study. You were referring to that earlier, weren't you?

A There's not been a market conduct study?

Q Or market conduct --

A Examination?

Q Examination.

A We do them daily.

Q Mr. Moskalski, the regional vice president, testified that he was unaware of any that had been done in Utah during the past many years. Are you aware of a specific one that was done?

A Are you talking about State Farm specifically?

Q Claims in State Farm. Are you aware of any?

[83] A We participate on occasion, with large companies, with --

Q I'm asking about State Farm. Are you aware of a specific one?

A No, I'm not.

Q All right. Isn't it true that your commissioners told our legislature that the department is under funded and they need more funds?

A Oh, I think that any head of any department in any organization says that, and I think that's probably true. For every organization.

Q Isn't it also true that to try and rely on the ratio that Mr. Belnap has given of the complaints to premiums, that is not an accurate picture of the total valid complaints that there may really exist if we were to know about all of them?

A It may be much lower. There's no way of knowing. But it does reflect, just like exit polls at elections do, it reflects what the public, what the individuals out there are thinking. It's an indicator.

Q Are you aware of anyone, a claimant or an insured, involving State Farm that was paid less than fair value?'

A Claimant being --

Q Third party or first party. Are you aware of [84] anyone who's been paid less than fair value?

A That would presume that I had access to the claims process, that I had physically seen a vehicle, that I had been able to look at doctors' reports and so forth. No way.

Q And you have no access to those?

A No way of evaluating that.

Q Okay. Isn't it true that, because there are a lot of people who don't even know about your services, that there's no way of being able to represent that that ratio is an accurate picture of State Farm's violations?

A Oh, I think it's taken in terms of its relationship to the other companies. It's dead accurate. But your point is well taken, that nobody knows whether there are more complaints out there, whether it's the tip of the iceberg, or whether there's fewer complaints out there. There's no way of saying. It's simply an indicator of their relationship with other companies. All companies have complaints to a degree. All companies have problems that come up, just like in every business.

* * *

[85] * * *

Q (BY MR. HUMPHERYS) You've mentioned that there was -- Well, let me back up. Is there anything in the Unfair Claims Practices Act that relate to allowing appearance allowances?

A Allowing?

Q Yes, specifically mentioning appearance allowances?

A Well, it's not disallowed. It's a common industry practice.

Q Okay. What I'm saying is, it's simply not mentioned in there, is it?

A No, certainly.

Q And you would agree, wouldn't you, that there are a lot of laws that apply to fair claims practices that are not in the regulations.

A Say that again, please.

Q You would agree, wouldn't you, that there is a lot of law that pertain to fair claim practices that [86] are not necessarily incorporated within the regulations?

A That doesn't make sense. If -- The Unfair Claims Settlement Practices Act and the Unfair Claims Settlement Practices Rules are the law. I mean there are no other laws, other than those, in the state of Utah.

Q Is that your testimony, then?

A I don't know of any other laws in the state of Utah that apply to those specific.

Q Remember when I asked you about the Beck case, and I gave you the five duties that were outlined by the Utah Supreme Court that applied?

A Well, that's case law, certainly. If you're referring to case law, as we discussed at that time, those things overlap with existing unfair claims --

Q But there are laws, whether case law or otherwise, that apply to insurance companies that aren't necessarily contained in your regs, right?

A There are. And we don't -- Some things aren't listed in any case law, some things aren't listed in the Unfair Claims Settlement Practices Act, some things are just not right. And we fight with the companies on those issues, as well.

Q Now, let me ask you, you say that you try and keep abreast of the Utah reported opinions regarding bad [87] faith? Is that right?

A Try to, sure.

Q Are you aware of the bad faith opinion in the Union Bankers case that came out just this last spring?

A I recall having read that.

Q And --
A But I don't recall the specifics.
Q What have you done to investigate that, Mr. Ovard?
A What have I personally done?
Q Yes.
A Nothing.
Q Isn't it true, Mr. Ovard, that you're here in behalf of State Farm, and that is a conflict of interest that you have, giving opinions favorable to State Farm when the, as you say, the investigation is still ongoing?
A I would say that that's a patently offensive and untrue statement. I don't want anyone, you or anyone else to think that I'm a fan of State Farm. I'm not. But for some reason they're the best to deal with, of the companies we deal with. They seem to try harder to comply with the laws of the state of Utah. No idea why that is. But I have -- Other than that, they're just another insurance company I have to fight with [88] daily.
Q Let me go back to Mr. Summers, and then we'll conclude.
A Sure.
Q You're aware that he admitted under oath to cheating and defrauding many of the State Farm insureds and claimants, are you not?
A I am.
Q And that you're aware that Mr. Summers has also been sued for fraud by Mr. Christensen in the Stalberger case. Are you aware of that?
A I'm not aware of that.
Q Are you aware that the Tenth Circuit Court of Appeals has rendered an opinion in the case of Summers versus State Farm, where they stated that Summers, while he was employed at State Farm, admitted to having falsified over 150 files? Are you aware of that case, Mr. Ovard?
A I'm not.

Q Are you aware that he was asked to teach a seminar to the Utah claims representatives on how to falsify documents to take advantage of claimants? Are you aware of that?
A I'm not aware of that.
Q Are you aware that Mr. Jensen said he [89] attended that, and commented that in the discussion, many of the claims adjusters said they were doing the same thing? Were you aware of that?
A No. I was told that, try to come down and listen to some of the goings on, I was told there was an exclusionary rule and I was not permitted to be here.
Q Have you taken any action against Mr. Summers?
A Yes.
Q Ray Summers. Not the other Summers.
A Not Art. I personally knew Art, and was glad to see him go to jail.
Q Not talking about Art. Have you personally taken any action against Ray Summers?
A Personally have.
Q You have?
A Personally have.
Q When did that take place?
A I can't give you an exact date, but --
Q Isn't he still a licensed adjuster?
A I hope that that will change, but --
Q He still is, isn't he?
A I believe he is.
Q Didn't you tell Mr. Christensen, as you sat with him and you looked in the computer under Summers' [90] name, that there hadn't been a single action taken against Ray Summers?
A I very well could have. I don't recall that.

Q Summers admitted under oath as being part of a scheme to deceive the Campbells. What has your department done to protect my clients, the Campbells?

MR. BELNAP: Asked and answered, Your Honor.

THE WITNESS: You really put me on the hot seat, don't you?

THE COURT: Overruled. Let's not follow any further on this one.

Q (BY MR. HUMPHERYS) Nothing, right?

A Well, as I --

Q You're supposed to be the public watchdog for the consumers, aren't you?

A Yes, sir. Certainly.

Q Don't you find it a little ironic that after State Farm, or after this court has already entered an order finding State Farm in bad faith, that you're here testifying for State Farm instead of for the Campbells?

MR. BELNAP: Your Honor, it's repetitious, asked and answered, and he was a subpoenaed witness.

THE COURT: Sustained.

THE WITNESS: I'm not testifying for State Farm, I'm sorry.

[91] * * *

REDIRECT EXAMINATION BY MR. BELNAP:

* * *

[92] * * *

Q There's been some evidence in this case, and the documents put up on the screen for the jury, that for a period, I think, it was from 1984 through 1988 or '89, State Farm once a year would have what's known as a pride month, where they would ask agents to, or that agents would participate in doing certain things, that employees would have referrals to

agents, reduce their pendings, reduce the number of certain kinds of errors on files, that there was encouragement for the use of Audatex estimating, after-market parts, and appearance allowances, and that those were divided into categories. And the person that had the best performance in a certain category would get a $25 dinner, or I think Mr. Felix Jensen indicated in earlier years they'd have a pizza party on occasion. Would that fall within the category of being an improper practice that you were asked about?

A I think all industries have ways that they try to increase the productivity of their individuals. It's specifically an unfair claims practice to key reducing claims, a specific claims payment, and have money go to an individual because of his actions.

[93] Q So in other words, if a person on a specific claim allegedly saved some money, and that goes to the person, then that's what you're talking about as being improper?

A Well, I'd have to read that regulation, but it's in that order.

Q All right.

A But incentives to be productive, that's pretty much a normal course of operation.

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EXCERPTS OF TRIAL TESTIMONY OF MARILYN J. PAULSEN, JUNE 25, 1996

[Vol. 13, R. 10268, commencing at p. 158]

* * *

MARILYN J. PAULSEN called as a witness by and on behalf of the Plaintiff, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION BY MR. CHRISTENSEN:

Q Would you state your name, please.

A My name is Marilyn Jean Johnson Paulsen.

[159] Q And do you live in the Cache valley area?

A Yes, I do.

Q Are you currently an employee of State Farm?

A I am.

Q And have you been employed at State Farm for almost thirty years?

A Twenty-eight.

Q Twenty-eight years. And what is your job?

A I'm a senior claim service assistant, which is a secretary.

Q Okay.

MR. CHRISTENSEN: May I lead this witness, Your Honor?

THE COURT: You may.

Q (BY MR. CHRISTENSEN) For a period of time you were a secretary in the office with Mr. Summers; isn't that true?

A That is correct.

Q And you would have started, if you've been there twenty-eight years, back in about '68?

A January 2nd of 1968.

Q Now, after you'd been there just a year or two, you became aware that Mr. Summers was falsifying some documents; isn't that true?

A I did come across some circumstances that led [160] me to believe that he may have been making some medical bills that had not been incurred.

Q And that would have been about, what, '69 or '70 that you first noticed that?

A That's right.

Q So that was about -- What's your best estimate? '69, or '70 that you first noticed that?

A I would say '70.

Q And these were -- He was putting bills in the file which hadn't actually been incurred for medical expenses; isn't that true?

A I had occasion to speak with a man who said he had not ridden in an ambulance from an accident scene to the hospital, but had ridden with the officer. And when I typed the closing report there was a bill in the file for an ambulance service.

Q Well, that was one experience you related in your deposition, but your testimony was that in the early seventies, you'd noticed he was putting bills in the file that had not been incurred by people; isn't that true?

A I did find other instances where I felt the bills had been made by Ray Summers and not incurred by the patient.

Q And you were concerned that that didn't seem [161] honest, weren't you?

A That didn't seem honest to me.

Q Okay. And so you went to the superintendent, Mr. Wayne Ballantyne, and you told him that Ray Summers was falsifying medical bills and putting them in files, didn't you?

A I told Mr. Ballantyne of the occasion I had mentioned on the ambulance bill, and told him that I thought it was

unusual that he would be inserting bills in the file, when I had in this circumstance found out the person had not incurred the bill.

Q Now, Mrs. Paulsen, you keep referring to an ambulance bill. It was more than one bill, wasn't it?

A There were other bills that I suspected had been made by Mr. Summers.

Q And you went and told Mr. Ballantyne about those, didn't you?

A Yes, I did.

Q And this was around 1970?

A To the best of my recollection, it would have been about 1970.

Q And he was the supervisor.

A He was the superintendent.

Q He was your boss, he was Ray Summers' boss?

A That's correct.

[162] Q And Mr. Ballantyne told you that what Ray Summers was doing was good business, it helped to settle claims; isn't that true?

A He told me that if Mr. Summers had reached an agreement --

Q No, answer my question, please. Didn't he tell you, and didn't you testify last October, that Ballantyne said what Ray was doing was good business, it helped to settle claims?

A If that's what I said, that's what I said.

Q That's what you said.

A Then that's what I said.

Q And you were under oath last October when you said it.

A That's right.

Q And it was true.

A Yes, it was true.

Q He also told you that Ray Summers was an excellent adjuster, didn't he?

A I think those words were from my deposition when I said that I thought Mr. Ballantyne thought Mr. Summers was an excellent adjuster.

Q Okay. I'm going to show you, I've taken this out of the trial testimony of last October, and this is page 1617. Mr. Humpherys asked you a question.

[163] "Mrs. Paulsen, do you recall that you had a strong concern about losing your job back at that time around the early 1980s?"

And would you read your answer, please?

A "I don't think I had a strong feeling that I would lose my job. I had not been with State Farm a long time. Mr. Summers was a very persuasive person, and Mr. Ballantyne thought he was an excellent adjuster, and told me that what Ray was doing was good business, it helped to settle claims."

Q All right, thank you. You've also testified that Mr. Ballantyne said he thought everything Ray was doing was fine, and that you shouldn't worry about it.

A Yes.

Q And that was when you went and told him he was falsifying documents. Isn't that true?

A Yes.

Q Now, it was your understanding that Mr. Summers was doing this to get some extra money out of the file to get the claimant, or the insured to accept a settlement; isn't that true?

A I felt that that was the reason he was offering them extra money, was to get them to settle their claim.

Q And that's why he was dummying the bills, was [164] to get that money to do that; isn't that true?

A He gave them the extra money and then documented the file so that it would add up.

Q And he was doing that to get, to entice the claimant to accept a settlement, wasn't he?

A I believe that he was.

Q As far as you know, he wasn't keeping any of the money himself.

A No.

Q Now, you also became aware that Mr. Summers was falsifying wage letters. Isn't that true?

A I did.

Q And those were used for the same purpose, to get money to entice people to settle?

A I believe that if a person wanted X-number of dollars and Mr. Summers wanted to give it to them to settle the claim, that he would put documents in the file to cover that.

Q You heard him on a number of occasions tell a claimant, "I'll give you an extra $25 to take your wife to dinner," didn't you?

A I did.

Q And that was a way for him to gain their confidence to get a better settlement.

A I'm sure that it was.

[165] Q It was a method of gaining their trust.

A Yes.

Q Now, you are not sure, but you believe he also told Ellis Christensen that this was going on; hasn't that been your prior testimony?

A That has been.

Q And you thought Mr. Summers' actions were inappropriate?

A Well, Mr. Summers, in essence, was cheating State Farm, and I thought that was inappropriate.

Q He was cheating State Farm by getting cheaper settlements for State Farm.

A No, he was cheating State Farm by overpaying people for money they had not asked for.

Q And getting people to settle, as he's described, you think, was he cheating State Farm?

A I think if he offered people $25 to go to dinner when they hadn't asked for it, and it was not a part of their settlement. I felt like that was cheating State Farm.

Q Now, it's interesting, Mrs. Paulsen, in your deposition you never said that, did you?

A I don't believe I did say that in my deposition.

Q Did that thought just occur to you as you [166] were getting ready to testify here today?

A No, sir, that has been true from the time I heard him doing those things.

Q So for him to give a claimant $25 to take his wife to dinner so that they would sign a release and perhaps save State Farm thousands of dollars, you thought was cheating State Farm.

MR. BELNAP: Your Honor, I'll object and move to strike. The question assumes facts not in evidence.

THE COURT: Overruled.

THE WITNESS: I've worked with Mr. Summers' replacement for fourteen years, he's never had to give anyone $25 to go to dinner.

Q (BY MR. CHRISTENSEN) All right, let me ask you this. You considered what he was doing was inappropriate, right?

A I felt what he did was inappropriate.

Q And you were asked in your deposition, "Then why didn't you bring it up again?"

And your answer was, "I needed my job." Isn't that true?

A That is what I said in my deposition.

Q And so you were willing to look the other way and ignore dishonesty to keep your job; isn't that true?

A No, that's not true.

[167] Q Well, you said you didn't bring it up again because you needed your job; isn't that true?

A I needed my job, I did not want to quit my job. I did not fear that State Farm would terminate me. I feared a confrontation with Mr. Summers that would make life so miserable in that office that I would quit my job.

Q That's also an explanation you've come up with recently?

A No, sir, that has been true from the time that this began fifteen years ago.

Q You didn't mention that in your deposition, did you?

A You didn't ask me.

Q You were asked, "And tell me the reason why you did not readdress this again?"

And your answer was, "I needed my job. I did not want to open up a big problem."

A That's right. I did not want to open up a big problem with Ray Summers.

Q And you were successful, you kept your job, didn't you?

A I certainly have.

Q And you want to still keep it.

A I have no fear of losing my job from State [168] Farm at all.

Q Now, you were also asked, "Did what Mr. Ballantyne told you give you any indication that you thought that it was all right with your supervisor?"

And your answer was, "That was the impression I got." Isn't that true?

A Mr. Ballantyne had told me he was satisfied, and so yes, that was true.

* * *

[169] * * *

Q (BY MR. CHRISTENSEN) All right, my question is this. We've now established through your sworn testimony, in your deposition last October, and today, that as early as 1970,

you had reported to State Farm management that Mr. Summers was dummying documents; isn't that true?

A Yes, as early as 1970 an incident had been reported.

Q Let's go back. I'm now looking at page 33 of your deposition. And I'm going to look at line 8. You were asked the question --

[170] MR. BELNAP: Counsel, can she see a copy of the deposition?

MR. CHRISTENSEN: Certainly.

Q (BY MR. CHRISTENSEN) You see you were asked the question, "And what happened, and when?" And what was your answer, beginning on line 9?

A "Well, as time progressed I perceived that he was putting bills in the file that had not been incurred by people."

Q Did you use the word "an ambulance bill," or do you use the word "bills"?

A I used the word "bills."

Q And that's what you told Mr. Ballantyne.

A I told Mr. Ballantyne about one instance that I felt like I could prove. Later I suspected that there were other bills that were put into the files.

Q Let's finish this. I'm going to reread your answer again. "Well, as time progressed I perceived that he was putting bills," that's plural, right?

A That's correct.

Q "In the file that had not been incurred by people."

Then you were asked the question, "When did this first occur?" And what was your answer?

A "I would say that I became aware of it after [171] a year or two."

Q And the question was, "Again, as early as the early seventies?"

A "Yes."

Q And the question was, "And what did you do about that, if anything?"

A "I talked with Mr. Ballantyne, that was the superintendent."

Q Question. "As early as the early seventies?"

A "That's right."

Q Question, "What did he tell you to do, if anything?"

A "He told me Ray was a good adjuster and that he thought everything was fine and not to worry about it."

Q Okay. And he also told you that what Ray was doing was good business, it helped to settle claims, right?

A He told me he thought what Ray was doing was all right.

Q It was good business.

A If you say so.

Q Well, I'm using your words.

A I know, but it's been a year since I said these words.

[172] Q I thought you just said them a few minutes ago. Would you read your answer, again --

A Mr. Ballantyne thought he was an excellent adjuster and told me that Ray was doing good business. It helped to settle claims.

Q Okay. Thank you.

MR. CHRISTENSEN: I have nothing further.

* * * *

EXCERPTS OF TRIAL TESTIMONY OF STEVEN D. PRATER, JULY 2, & 3 1996

[Vol. 17, R. 10272, commencing at p. 22]

* * *

STEVEN D. PRATER called as a witness by and on behalf of the Plaintiff, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION BY MR. HUMPHERYS:

Q Would you state your full name, please.

A Yes, my name is Steven Darrell Prater, P-R-A-T-E-R.

* * *

Q And what is your occupation?

[23] A I am a member of the law faculty at Santa Clara University School of Law, I'm known as an adjunct professor of insurance law. I've been teaching there for the past thirteen years. This coming year will be my fourteenth consecutive year teaching the course at the university law school on insurance law and practice.

I'm also an attorney, admitted to practice law in the state of California, and I also have had, for a number of years, a consulting practice, where I do insurance issue-related consulting for employers, for insurance companies, agents, brokers, insureds, claimants, various parties that have an interest in the insurance field.

* * *

[29] * * *

Q Now, before we get to that, let me just go back to your work as a professor. You mentioned that you teach insurance law.

A That's right.

Q In those courses where you're teaching law students about insurance law, do you get into issues that are part of the Campbell case?

A Yes, I do.

Q Do you discuss and teach principles of good faith by, implied covenants of good faith and fair dealing?

A I do.

Q And the unfair claims practices acts?

A Yes, sir.

Q And standards in the industry that are applicable to all of the insurance companies?

A Yes, I do.

Q All right. Now, you mentioned that some of your clients, or you consult with some clients who are insurance companies.

[30] A Uh-huh.

Q Could you quickly just give us a list of the kinds of companies that you have been asked to represent, and have represented, either as an expert or as a consultant?

A Sure. Some of my insurance company clients, present and past, would include Allstate, Equitable, CNA, Continental, the Hartford Group, Blue Cross, Blue Shield Insurance Company of North America, John Hancock, Farmers Insurance, Liberty Mutual, Union Central Life, Connecticut General, Mercury Casualty, the auto clubs, three As, Lloyds of London, and in the past, on several occasions, I've been retained as an expert, as a consultant for State Farm.

Q State Farm has actually hired you in cases as a consultant?

A Yes, they have.

Q More than one case?

A Yes.

* * *

[31] * * *

Q Now, if we could get an idea of the quantity of cases you've worked either for or against State Farm as it relates to your total practice, are we talking about a major part of your work being related to State Farm?

A The State Farm work has taken a lot of my time in the last few years, since about 1993, because of the documents that have been produced in the back of the room, primarily that came out of the Singh trial. They still don't represent a majority of the cases I work on, however.

I think I've testified live in trials against State Farm on two occasions. I've probably had three or four cases where they've hired me that either settled -- They settled, as I recall, and never went to trial. I might have, you know, three or four more that I'm looking at.

I get calls frequently on State Farm cases, I take very few. Three or four calls last week. And I turn most of those down. I just don't have the time. I have lots of other clients, lots of other things I'm doing. I'm starting to do a lot of mediations, where [32] both sides agree to have me as the neutral expert.

Q Are these court mediations or do they --

A Yes.

Q Are you a court-appointed mediator?

A They have mediation that's appointed by the court, and I'm a mediator that's frequently used.

Q Explain to the jury what a mediation is, or a mediator, in the context of what we're talking about.

A Well, both sides, the insurance company side and the plaintiff's side, generally have to agree on somebody, and then they both come and they present their case to me, and I try and help resolve the matter.

I listen to both sides, and I tell them my opinion, the positives and negatives of both sides of the case, and we try and effect a settlement. And --

Q Okay, and the insurance company would have to agree upon you, as well as the plaintiff?

A That's right.

Q Okay. Now, have you also worked as an expert for the state of California?

A I have. They hired me recently as the expert on the insurance regulations on the Unfair Claims Practices Act in a case that they brought an administrative action that was brought against an out-of-state company.

[33] Q All right. Now, have you also lectured and been a speaker at various seminars and training conventions in the insurance area?

A Yes, I have.

Q Can you just briefly relate to us some of your work in that area?

A Sure. In the last ten or so years I've been a featured speaker, a keynote speaker at more than 200 insurance seminars and conventions around the country, and indeed, in other parts of the world. Including here in Utah.

I've had an opportunity, I've been invited here to talk in Utah to the State Agent's Association on legal duties and responsibilities, those kinds of things. I talk at lawyers' conventions from time to time, sometimes they're plaintiff's lawyers and sometimes they're defense lawyers, and sometimes they're both.

And yes, so it's something that I've done a lot of in the past. I haven't had as much time to do it, although I frequently get invited, but I haven't had as much time to do it in the last couple of years.

Q All right. Now, as someone who's been retained in this case -- Well, let me ask you. Did the plaintiffs retain you in approximately 1993 or early '94 [34] to review the Campbell matter, and render opinions?

A Yes, my recollection, I was first retained in this case to start looking at documents as a consultant initially in, I believe it was December of '93 when I first started commencing work on this case.

Q Now, do you charge for your time when you get involved in cases like this?

A Yes, I do. I charge the same to either side. I charge $250 an hour for my consulting time.

Q What have you reviewed in preparation for rendering opinions in this case?

A Well, I've reviewed many documents that were specific to the Campbell case, as well as those documents in the back of the room that relate to the Campbell case, and other cases that I've been asked to look at in the past.

Specifically in connection with the Campbell case, I've reviewed thousands of documents, I've reviewed the Utah Insurance Department rules and regulations that relate to unfair claims practices, I've reviewed more than 50 volumes of deposition transcripts of various people involved in the handling of the Campbell case.

Q Now, those are specific to the Campbell case.

A That's right.

[35] Q Have you read depositions of other cases involving State Farm, as well?

A Hundreds of other people from different parts of the country, coast to coast, talking about various cases pending or resolved in other jurisdictions.

Q All right, what else have you reviewed?

A I've reviewed the trial transcript of the bad faith trial that took place in October last year before a different jury, where State Farm was found to have been guilty of bad faith, and I read the transcript and the testimony that came into that trial.

I've also been reading the trial transcript daily that's been sent to me every day in this trial, so I've had an opportunity to hear and to read what the witnesses have said in this particular case.

Q I think Cecilee would appreciate hearing that all of her work here being done is being used to good effort. In fact, have you even read as close as the transcript of the witnesses last Friday?

A Yes.

Q So you're current as to what has been gone on in the trial in the present, during the present trial; is that right?

A I am.

Q What other kinds of things have you reviewed [36] in preparation for your opinions?

A I've reviewed hundreds of PP&Rs, I've reviewed the transcripts of various court hearings, I've reviewed various internal State Farm manuals, memoranda, president's messages, video tapes, training and teaching materials from the State Farm claim schools, and training and teaching materials that are used in the ongoing training. The claim school is the starting point. The training is continuous if you're employed at State Farm.

I've reviewed, and recently produced to State Farm in those boxes back there, in the back of the room, 73,278 documents that were recently copied, and I provided copies of those to State Farm at their request, including hundreds of depositions, State Farm company-wide manuals, various PP&R manuals, claim superintendent manuals, auto claims manuals, auto investigation resource manual, the Excess Liability Handbook, various internal publications that are used for the ongoing training of the State Farm personnel, including, I think it's referred to the "Obiter Dictums," which is a Latin phrase for "the last word." That publication.

The Mediclaim publication, which is an internal publication of the claims department to help [37] get people educational information on handling medical claims. I've reviewed special investigation unit guidelines, general claims memorandums, executive claims memorandums from the home office. I've reviewed basic claims course materials and other training materials. I've reviewed internally-generated State Farm reports of various sorts, as well as statistical information, including some of the statistical information that's being used by State Farm as exhibits in this particular case.

It's important to point out that this is not the universe of documents that I've reviewed in connection with State Farm. There are more than that, those in the back of the room that I have also reviewed that I no longer have, or couldn't bring with me because they're subject to various orders in other cases, so I can't talk about those.

Q When you say subject to orders, what do you mean? Protective orders?

A Yes, sir.

Q Now, just explain to the jury what a protective order is, so that they know why you can't talk about them.

A Well, there's various cases that I'm involved in, and it's not uncommon for State Farm to insist on --

[38] MR. CRANDALL: Your Honor, objection.

MR. HUMPHERYS: It's foundational regarding additional documents he's reviewed, and why they're not here, and why he can't refer to them.

THE COURT: Overruled.

THE WITNESS: It's something that it's insisted upon to kind of keep it from the public's eye, to keep it contained within the particular trial, at least for a period of time. And sometimes those orders are lifted at some point. But until they're lifted, I have to be very careful about discussing those documents.

Q (BY MR. HUMPHERYS) All right. Now, can you give us just a general idea of the amount of time that you have spent in this case preparing for testimony?

A In this particular case, since 1993, I've spent in excess of 300 hours reviewing the documents in connection with the Campbell case.

Q Now, is that in addition to all of the other hours that you've spent in other cases reviewing documents?

A That's right. I've spent hundreds and hundreds of hours in connection with State Farm materials in the past several years.

Q Has this material given you sufficient [39] information for you to form opinions regarding the various practices, patterns, and activities, policies and procedures of State Farm, not only locally, but nationwide?

A I believe that it has, yes.

Q All right. Now, what I would like to do is to move now into some of your opinions, and get right into this so that we can move as quickly as we can through your testimony.

You talked about, or we mentioned a minute ago, the implied covenant of good faith and fair dealing. Now, perhaps to help us understand that just a little bit, could you tell us the difference -- We've heard the difference, so don't make it a long explanation, but to refresh our memory, what is the difference between a first-party claim and a third-party claim?

A A first-party claim would be a claim you would make against your own insurance company. You've paid the premium, you're issued the policy. It would be like a health insurance claim, a property damage claim on your auto or uninsured motorist, where you buy UM coverage. That's first-party coverage, because you paid for that. And that's protection that you've purchased, because you had the foresight to do that. And if you [40] have a claim, you make it against your own. Fire insurance, homeowners.

But homeowners insurance policies and auto policies also include liability insurance, which is to take care of the third-party risk. A third-party insurance relationship is one where you have a third party that's a stranger to the contract, they bring an action against you, and you look to your insurance company to do two things, primarily. To defend you, to provide a defense, and second, to indemnify you, or to settle cases.

If there's a likelihood of an excess judgment, you want that liability money to be there to settle it, to remove the risk to you. So it's very common to have both coverages, first and third party, in one policy, homeowners/auto. There's also an additional important purpose of liability insurance.

MR. CRANDALL: Objection, Your Honor, beyond the scope of the question.

Q (BY MR. HUMPHERYS) I'll just ask you. Tell us what the purpose of liability insurance is.

A It's a very important one, and it's strong public policy considerations that we encourage people to buy liability insurance, so that if there's innocent people that are injured, there's a pot of money that can [41] be available to compensate injured people.

And that's why doctors and professionals, and we all carry liability insurance, because if we get into some kind of accident, or make a mistake, or act negligently, there's a source of money available to help compensate the injured third parties. And that's another very strong purpose for and reason for liability insurance.

Q All right. We've used the term good faith, bad faith, covenant of good faith and fair dealing, implied covenant of good faith and fair dealing. Are all of those essentially wrapped into the same concepts?

A Yes, they are.

Q Would you explain briefly what it means when we say "the implied covenant of good faith and fair dealing"?

A Sure.

MR. CRANDALL: Objection, Your Honor, calls for a legal opinion. This witness is not designated as a legal expert, he's an insurance expert.

MR. HUMPHERYS: I'll qualify the question.

Q (BY MR. HUMPHERYS) Based upon the standards of the industry, are there implied covenants of good faith and fair dealing that become part of those standards?

[42] A Sure.

Q Now, would you please describe to the jury what is meant by the implied covenant of good faith and fair dealing.

MR. CRANDALL: Object to the form of the question, calls for a legal opinion. That's the court --

THE COURT: Overruled. You can answer as to the industry standard.

THE WITNESS: It's a well-known and understood concept in the industry. We all know that the implied covenant means it's an implied promise in an insurance contract. It's express, it's not written in the contract. It emanates from the contract. It's an implied promise that exists, because of the inherently unequal relationship that exists between an insurance company and an insured.

Those of us in the insurance business know that when we're selling insurance, we're selling something very important. We're selling an intangibility, we're selling a promise. We're not selling a widget or a chair, or something that's not important. We're selling security, we're selling peace of mind. We're selling a promise, freedom from financial worry in the event you have a catastrophic [43] claim.

MR. CRANDALL: Objection, Your Honor, this is an editorial, not a response to a question as to what the standard of the industry is of good faith. Beyond the scope of the question, non-responsive. I'll move to strike.

MR. HUMPHERYS: It goes to the very heart of the implied covenant, Your Honor.

THE COURT: I'll allow him to answer it. I think we've heard about enough on it.

Q (BY MR. HUMPHERYS) All right, now, could you now tell us generally what is understood in the insurance industry that relates to this implied covenant of good faith and fair dealing, and how insurance companies are required to adhere to this standard?

A Sure. Basically the standard requires us in the business, and we know it, to treat our insureds honestly and fairly. We know that if there's a lawsuit filed against an insured, that we've taken money from, premium payments monthly in exchange for our promise to be there for them, that we have to accept settlement offers where there's a substantial likelihood of an excess verdict being rendered against them.

We know that we have to conduct full, fair, thorough investigations and evaluations with a proper [44] focus. In other words, claims handlers aren't supposed to be looking for reasons not to pay, or for loopholes, or ways to escape. They're supposed to be looking for ways to honor the promise, exculpate insureds from bad situations.

Q "Exculpate," Professor?

A Remove them, get them out of the trouble. That's why the liability insurance is there. We know also, in third-party cases, that you have to keep the insured informed, constantly advised as to what's going on, so that they know.

Because you're supposed to treat lay people as lay people, not as experts in insurance. You have to explain concepts and stuff to lay people, as people that aren't trained in the nuances and subtleties of insurance law. It's a basic requirement of honesty and fairness and reasonableness, is

the word that's used frequently as a synonym for bad faith. Unreasonable conduct by an insurance company is known to be bad faith.

Q In a third-party context, are there additional duties as part of this covenant of good faith and fair dealing, that pertains to disclosures to the insured who is now being sued?

A Yes, as just suggested, you have to tell [45] them. You have to be honest with them. You have to be up front with them about their risks associated with a potential excess verdict. So that they can, if need be, select independent counsel to give them advice and protect their interests in the event of an excess of the coverage available kind of a problem.

Q What about misrepresenting facts, or misstating, or misleading facts in that context?

A Absolutely improper.

* * *

[47] * * *

Q All right. Now, are these implied convenants of good faith and fair dealing reduced to some kind of written guidelines, or written regulations, or some other kinds of written standards which apply?

[48] A There are well-known guidelines and standards in the industry that we commonly refer to as the Unfair Claims Practices Act. These provisions are probably the best-known provisions to insurance claims handlers and insurance companies throughout the country.

They may be contained in legislation, they may be contained in rules and regulations that are promulgated by the Department of Insurance. But suffice it to say that, throughout the country, most states, including Utah, have adopted the Unfair Claims Settlement Practices Act regulations, which set forth the minimum standards for good faith claims handling.

And I might note that State Farm, in the manuals here in Utah, reprint those exact standards, and require their claims handlers to fully comply with those provisions. And it's in the State Farm manuals, and certainly the testimony all over the country, that State Farm expects that its people fully comply with those rules as a minimum to comply with the good faith responsibilities.

Q All right, Mr. Prater, what I want to do for a moment is to show the jury some of the Unfair Claims Practice Act provisions that are contained in State Farm's auto manual as seen in Exhibit 56, which I believe is already admitted into evidence. And what I [49] would like to do is to turn to trial page number 10 of the State Farm auto manual.

Now, is this a copy of the Unfair Claims Practices Act that's contained in their manual?

A That is a portion of it, that's correct. That's section 2, which just states the purpose.

Q All right. Now, I appreciate that we've got a situation where the lower portion is a bad copy, but I'd like you to review, if you could, please, the first few sentences of the purpose of the Unfair Claims Practices Act. I'll move it up. Can you see it okay from where you're at?

A Sure, and I have a copy in front of me, so I can read from either. The purpose. "The business of insurance is a public trust assumed by persons accepting licenses to operate in this state, and inherently includes a duty to treat claimants equitably and in good faith. The breach of such duty is considered to be an unfair or deceptive practice, and, if generally engaged in, an unfair method of competition. Such a practice is detrimental to free competition, and injurious to the insuring public."

Q Okay, I'm going to come back to the issue regarding injurious, or excuse me, detrimental to free competition. And we'll come back to that at a later [50] time today. But on the issue of injurious to the insuring public, what is your understanding of the meaning of that?

A Well, basically, if an insurance company knowingly engages, or frequently engages in any of the enumerated -- Which we'll see some of them, I assume.

Q Yes.

A Some of the defined and enumerated unfair and deceptive practices, that it means what it says. That it is injurious to the public. It's a way of harming them, and not fulfilling the obligations that you have under the rules.

Q The following page in this manual gives some definitions. And I would like to focus your attention to the definition of "claimant," because that word is used in the other provisions of the Unfair Claims Practices Act. Would you please read that to us.

A That's right. The definition of "claimant" means, "Either a first-party claimant, a third-party claimant, or both, and includes such claimant's designated legal representative, and includes a member of the claimant's immediate family designated by the claimant."

Q All right. So this would be the first-party context and the third-party context that you described [51] earlier?

A Yeah, that's right. And the purpose that we just read, it says that you have to treat both people fairly. There's no implied covenant of good faith and fair dealing that runs to the third-party claimant, because that arises out of the contract. And the third party is not a party to the contract.

That's why there's no good faith duty under the implied covenant owed to the third-party claimant, the Slushers and the Ospitals in this case. Because they're not parties to the insurance contract. But there is still a legal duty, and rules

and regulations which State Farm has adopted as part of its minimum standards, that it must treat them fairly and in good faith anyway. There's no cause of action for bad faith, because they're not in the contract. They're outside of it.

But there's a duty, under the rules and the regulations, and basic principles of fairness, to also treat third-party claimants fairly. If they're injured, and they're entitled to some of that liability money, give it to them. That's what it's there for.

Q All right, now, on the following page of this same exhibit and manual, we get into section 5. "Unfair methods of competition and unfair deceptive acts and [52] practices defined.

"The following are hereby defined as unfair methods of competition and unfair or deceptive acts and practices in the business of insurance." And then there are many that are listed below that.

I would like to have you draw your attention to number, or letter A, subpoint A. Would you read that to us, and explain, based on your experience as an insurance expert, what that means.

A "It's a defined unfair or deceptive practice to misrepresent pertinent facts or insurance policy relate -- " It should say "provisions." I think State Farm left out a word in the manual. I think the actual act says, "Or insurance policy provisions relating to coverages at issue."

Q Okay, now, before we leave that, and before you explain it, let me just make reference to this phrase here, it's worded in terms of unfair competition, and unfair practices. Now, again, we're going to come back to the competition a little later today to discuss that. But I would like you to focus your attention on what this means as it relates to the insuring public.

MR. CRANDALL: Objection, calls for a legal conclusion as to what that means.

Q (BY MR. HUMPHERYS) Let me just ask you, what [53] does it mean in the insurance industry?

MR. CRANDALL: Objection, Your Honor, he's calling for a legal opinion.

THE COURT: Approach the bench, counsel.

(Side bar conference held out of the hearing of the jury.)

Q (BY MR. HUMPHERYS) Mr. Prater, as it relates to how insurance companies apply standards such as subpoint A, would you tell us in what context this applies, subpoint A?

A Basically it means you have to tell the truth, and that means affirmatively. And you can't just, you can't omit something, either, because that's not telling the whole truth.

Sometimes people think that just means affirmative lies or misrepresentations, and that's not it. You have to tell the whole story. Even sometimes when you hold things back and don't tell everything, that can be a misrepresentation as well. So it's just the basic insurance lingo way of saying, "Tell the truth to people."

Q The following page, I'd like you to refer to subpoint F. And read that to the jury, please.

A "It's an unfair and deceptive practice," and that's the preamble, "not attempting in good faith to [54] effectuate a prompt, a fair, and equitable settlement of claims in which liability has become reasonably clear."

Q And how is that applied to the, in the context of claims adjusting, as they carry out their duties?

A Basically, in a third-party setting, if you have an accident and it's reasonably clear that the insured is responsible for that accident, you have a duty to try and attempt to effectuate a prompt and a fair settlement as soon as possible, to settle the case.

And a first-party setting, that can mean if you file your own claim, and the insurance company knows it should pay, they should try and pay it as soon as possible, as fairly and equitably as possible.

Q I want to draw your attention to the following page of the same exhibit, subpoint O and subpoint 2 under O. Would you please read that.

A Sure. And again, this is continuing defined unfair claims. "Refusing payment of a claim solely on the basis of an insured's request to do so, unless the insured is granted the right under the policy of insurance to consent to the settlement of claims."

Q Now, did Mr. Campbell, in the policy that was issued to him, retain the right under the policy to reject a settlement, or control a settlement?

[55] A No, he gave up his control. This applies to doctors' policies, and professionals. Our policies have consent clauses in them that carriers can't settle our cases made against doctors or lawyers without our consent, because of the special considerations that professional, for example, doctors have. They usually have consent rights. But it's not standard in auto policies or homeowners policies.

Q With subpoint 2 ruled out, then how does the insurance, or claims people apply subpoint O?

A Well, if an insured requests that you don't settle, "I want to go to trial," and the company says "Well then we're going to go to trial, and that's the reason we're going to go to trial," that's unfair to do that, and it's the violation of this. You have a duty to the claimants too, the innocent injured people.

Q Such as the Slushers and Ospitals.

A Yeah, they're looking to that liability money. That's what they're entitled to. So the insurance company sometimes will say, "Well, gee, we didn't pay because our insured didn't consent." Well, that's not an issue. Consent or lack thereof is not an issue in an automobile policy.

An insurance company is responsible to make that decision. They have specialized knowledge, they [56] have a better idea of what's going to happen in a trial, because

they do lots of them. So they know when people are going to get hit with excess judgments much more than a lay person, so it's their responsibility to step up to the plate and tell the insured, "Look, it's dangerous, we're going to settle."

MR. CRANDALL: Objection, responsibility, that's the court's function. Legal responsibility.

THE COURT: Sustained.

Q (BY MR. HUMPHERYS) If you would, in all of these questions, restrict your opinions and comments to what the practices are as they apply to the claims personnel and insurance companies, so we're not giving legal opinions. Has that, in fact, been the case in what you've said?

A Yes.

Q And I would ask that you continue to do that. If someone were to violate these terms that we've just been looking at, are they violating the standards of their own insurance policies?

A Their own manuals. Their own procedure manuals, since this is from the manual.

Q Would they also be violating insurance standards in the industry?

A Yes. Conduct that falls below those [57] standards is never good. It's never right.

Q All right. Now, do those unfair claims practices acts, regulations, standards and so forth, are they amended from time to time?

A Yes, they are.

Q And has that, in fact, been the case in Utah?

A Yes, it is.

Q Okay, I want to draw your attention to one of those amendments, that's contained in Rule 590-89-6. Excuse me, dash 8, subpoint C. Is this a later amendment to the prior standards that we were looking at?

A Yes, it is.

Q Okay. I'd like to draw your attention, now, it essentially has the same preface regarding unfair methods, deceptive acts and practices defined. I would like you to focus on C and read that.

A "Compensation by an insurer of its employees, agents, or contractors of any amounts which are based on savings to the insurer as a result of denying the payment of claims."

Q How is that applied in the insurance industry as meaning that this is an unfair claims, or deceptive practice?

A Well, compensation should not be a [58] consideration for a claim handler. Their job is to pay claims, and not worry about profits, or to be looking to make money because of saving money for the company.

Q So it should not be based on savings to the insurer?

A That's right. The compensation shouldn't in any way be related to that.

Q And again, is this the standard in the industry?

A Absolutely.

Q And if someone were to violate this, are they violating industry standards?

A Correct.

Q I'd like, on that same amendment, to have you draw your attention quickly to another subpoint. Now, these became -- Well, let's see, as it pertains to this particular subpoint, do you see -- Well, let's see, I think it's J. 2-J. Yes, right here. Would you read that to the jury.

A Actually, let's see, is that the right page?

Q I might have the wrong one. Let's see, I'm sorry it's not 2-J. It's just J. I'm sorry, it's just J. "Advising a claimant not to obtain the services of an attorney, or suggesting the claimant will receive less money if an attorney is used to pursue or advise on [59] the merits of a claim." Is that also considered an unfair and deceptive practice by the insurance company?

A Yes, it is.

Q Now, on another page, subpoints J and K, again, these are under different sections. Would you please read J and K.

A "Intentionally offering less money to a first-party claimant than the claim is reasonably worth," a practice referred to as "low balling."

Q Okay, we're going to talk about low balling, and have a little bit in the past. So low balling is actually defined in these acts?

A Correct.

Q As we've just read. Okay, now, K.

A "Refusing to offer to pay claims based upon the doctrine of comparative negligence without a reasonable basis for doing so."

Q Of what significance is it that an adjuster would use comparative fault in adjusting? What difference does it make on the payment of the claim?

A It's a way to reduce the payment on the claim. If there's, if the state allows some kind of offset, or reduction for comparative fault, then if you come up with a comparative fault number, it reduces the amount that you have to pay out.

[60] So if the claim's worth $10,000, but you're 50 percent at fault, we'll only pay you five. And sometimes there's legitimate comparative negligence defenses. And sometimes there's not. Sometimes it's just used as a technique to pay less than a person's entitled to.

Q And when it's used as a technique, then it becomes a deceptive and unfair practice?

A That's right.

Q Now, we heard some testimony from Mr. Kingman a couple of weeks ago, where he referred to State Farm's mistake in the Campbell file as an innocent mistake, I think those were the words he used. Do you agree that State Farm's mistake in the Campbell file was an innocent mistake?

A Absolutely not.

Q Why?

A Well, it was clear very early on, in my review of this file, that this was a case where State Farm acted in bad faith, that they failed to accept repeated settlement offers to settle within Mr. and Mrs. Campbell's policy limit, when liability was reasonably clear.

This was a low-limit policy, 25-50. There was clearly a substantial likelihood of an excess [61] verdict. As ultimately proved out, Mr. Campbell was found to be 100 percent at fault. This was a serious exposure case, it was very likely to endear a lot of jury sympathy.

These are factors you take into consideration in the business, when you're evaluating a claim and what's it's worth. You have a young man that's dead, and you have another that's not at fault at all, who's seriously injured.

This is the kind of case that can be explosive. You know that if you handle these kinds of cases, or if you work on as many files as I've worked on, looking as these kinds of cases. I haven't handled these kinds of claims myself, but I've worked on many files, and I've studied many examples of these kinds of cases.

Q Let me draw your attention to Mr. Kingman's own testimony, when he said, as he sat through the trial, or portions of it last October, he said that he concedes that the policy limits should have been paid before the trial, and it should have been settled.

A Right.

Q Now, if Mr. Kingman could see that, is this an honest mistake?

A No.

[62] MR. CRANDALL: Objection, no foundation, calling for speculation as to an honest mistake. And asking for a psychological analysis of the decisions in the 1983 case.

THE COURT: Lay some foundation for this, counsel.

MR. HUMPHERYS: All right.

Q (BY MR. HUMPHERYS) Is an honest mistake consistent with a finding of bad faith?

A Absolutely not.

MR. CRANDALL: Objection, calls for a legal opinion, Your Honor. Move to strike.

MR. HUMPHERYS: Well, let me alter it, then.

Q (BY MR. HUMPHERYS) Is --

MR. HUMPHERYS: Well, Your Honor, we have a finding in this case, which is res judicata, of bad faith.

MR. CRANDALL: We agree with the finding, Your Honor, we're not here to dispute the finding. That's not the issue in this case.

MR. HUMPHERYS: One of the issues is, he raised whether it's an honest mistake, and I'm now asking him to discuss the issue of honesty, or an honest mistake, versus the finding.

MR. CRANDALL: There's no foundation.

[63] THE COURT: This is not a discussion of legal principles.

MR. HUMPHERYS: No, it is not.

MR. CRANDALL: But also there's no foundation for this witness to discuss whether a person who made a mistake made an honest mistake or not an honest mistake. There's no foundation. That calls for a psychological analysis.

THE COURT: Frame the question so that we can understand, before he answers it, what his interpretation of honest mistake is, whether it's psychological, or it has some other meaning to the witness, and then we'll decide whether it's a proper question.

Q (BY MR. HUMPHERYS) Are you familiar with the term "honest mistake"?

A Yes, as it's used in insurance practices, as it relates to bad faith or lack thereof.

Q Okay, and what does it mean to you?

A An honest mistake is not bad faith. And for Mr. Kingman to suggest that this was an honest mistake is misrepresenting the truth, because it was found to be not --

MR. CRANDALL: Objection, Your Honor, no foundation for this witness to make comments on as to a [64] witness' veracity.

THE COURT: I'll sustain the objection.

Q (BY MR. HUMPHERYS) Without commenting on Mr. Kingman's veracity, and limiting your response to the issue of "honest mistake," end of quote, you were explaining why an honest mistake cannot be consistent and be true of this particular case. Do you have anything in addition you'd like to comment on?

MR. CRANDALL: I'll object as irrelevant, Your Honor. We have a res judicata decision regarding the refusal to pay when there was a substantial likelihood of an excess verdict. It's irrelevant to this case.

MR. HUMPHERYS: Your Honor, we absolutely agree that that is binding. But we have to respond when Mr. Kingman says it's an honest mistake.

THE COURT: Overruled, I'll allow the inquiry. Perhaps you could start by having him define what the industry, if there's a definition, if it's an industry term, what is meant by the term "honest mistake."

Q (BY MR. HUMPHERYS) You were defining what "honest mistake" was. Would you now tell the jury what, in the industry, is an honest mistake?

A Well, I think it's self-evident, an honest [65] mistake is one that's not reasonable. Bad faith is unreasonable conduct. Honest mistakes are not bad faith, because they're not unreasonable. And that's how it's understood.

Q All right. Now, you were beginning to explain why this would not be an honest mistake. You were talking about the low limits, the exposure, the risk and so forth. Are there other reasons which have led you to believe that this is not an honest mistake, as defined by the industry?

A Sure.

MR. CRANDALL: Objection, res judicata. It's been determined under the Utah law that there is a substantial likelihood of an excess judgment, a jury's decided there was unreasonable conduct by State Farm.

THE COURT: I'm going to allow it --

MR. CRANDALL: That's been resolved.

THE COURT: I'm going to allow it, because that door was opened with the testimony of the prior witness from State Farm.

MR. HUMPHERYS: Your Honor, perhaps we could avoid this if State Farm would stipulate this was not an honest mistake. Will State Farm stipulate it?

MR. CRANDALL: State Farm is not here to stipulate to that issue. The question before this jury, [66] Your Honor, is, "Were the Campbells damaged?" That's what we came here to decide.

THE COURT: I understand. Proceed.

Q (BY MR. HUMPHERYS) Let's proceed, now, since they won't stipulate to it. What are the reasons why?

A I think even Mr. Summers conceded that they purposefully misled the insureds in this particular case, that State Farm knew from very early on that Mr. Campbell was likely to suffer an excess verdict with severe consequences, because he was retired, he didn't have a lot of assets, he couldn't afford to have an excess judgment rendered against him.

But he was directed, he said, by his superiors, as part of his on-the-job training, to change the reports, to alter the file, to shift the blame to Mr. Ospital.

Mr. Summers also testified in his deposition that he was asked, or directed by Mr. Noxon to put on the file that Mr. Ospital was speeding because he was on his way to see his pregnant girlfriend. He wouldn't do that, because he said there was no foundation, he wouldn't put that rumor in the file in order to make it look bad in front of a jury, make Ospital look worse.

Q There was no pregnant girlfriend, was there?

A There was no evidence of any pregnant [67] girlfriend.

* * *

[68] * * *

Q (BY MR. HUMPHERYS) There are a couple of other points, or do you have any other additional points which evidence why you have concluded this could not be an honest mistake?

[69] A Sure, because they acted unreasonably in failing to keep Mr. Campbell fully advised of the risks and exposure of going through the trial. They were lulled into a false sense of security by State Farm's representative, Mr. Bennett, who told them, "You don't really have anything to worry about. Your limits are sufficient." I think that was unreasonable to give him that kind of advice. I think there was bad faith.

They also failed to comply with the minimum standards of the Unfair Claims Practices Act that we talked about, and various provisions contained therein.

Q All right, now, we have a copy of the judgment in this case, and have marked it as Exhibit 47. Let me just show that to you. I don't recall that it was admitted, yet. I'm sure there's no -- I think the court has already determined it's admissible. Is that, in fact, the judgment on the verdict of the October trial, of 1995?

A Yes, it is.

MR. HUMPHERYS: We would offer it into evidence.

MR. BELNAP: No objection.

THE COURT: Received.

(WHEREUPON Exhibit Number 47 was received into evidence.)

[70] Q (BY MR. HUMPHERYS) I'd like to have you turn to the last page. Now, there's two or three pages before that pertain to what the jury found, and made their findings regarding that prior case. Can you see that okay? Or I guess you could probably read your copy, but let's read starting, "It is hereby ordered, adjudged, and decreed."

A "It is hereby ordered, adjudged, and decreed that plaintiffs are granted judgment of liability against defendant State Farm Mutual Automobile Company, based on State Farm's breach of its duty to act in good faith in defending Curtis Campbell, by unreasonably failing to settle the Ospital and Slusher claims against Curtis Campbell within the Campbells' policy limits.

"By reason of such liability, plaintiffs are entitled to recover such damages, if any, that have been proximately caused by the above breach, the amount of which will be determined in the next trial.

"The remaining issues, including plaintiffs' other theories of liability, plaintiffs' damages, and defendant's liability for punitive damages, if any, will be reserved for the next trial."

Q And that's signed by the judge on December the 11th of 1995.

A That's correct.

[71] * * *

Q (BY MR. HUMPHERYS) Mr. Prater, we just finished talking about the Campbell case. Have you worked on other cases similar to the Campbell case where you have reached opinions regarding State Farm's unfair claims practices?

A I have.

Q Can you give us another example of a similar kind of case, where you have reached similar opinions?

[72] A Sure.

MR. CRANDALL: Objection, irrelevant.

MR. HUMPHERYS: It goes to the issue of punitive damages, Your Honor.

THE COURT: All right, overruled.

THE WITNESS: Another case I was involved in for a couple of years was known as Smith versus State Farm, it arose in West Virginia. And just briefly, the underlying facts are as follows.

In November of 1987, a young kid, eighteen years old, named Billy Smith, was driving his grandmother's car with passengers in the car. They had been to a party, he'd been drinking, he was twenty-one. He had his girlfriend sitting next to him, he had some people that he didn't know, that he met at the party in the back. A kid named Michael Prichard, and I believe it was Lisa Arbergast.

And what happened is, he was taking them to show them some local tourist attraction. He'd been drinking, and the police started to follow him, and he started to run from the police. And turned the car, and he was running from the police, he turned the car, went down an embankment.

And he wasn't hurt, his girlfriend sitting next to him had some facial scarring and some damage. [73] Lisa Arbergast, the young girl who was about eighteen in the back seat, Michael Prichard is also in the back seat. Lisa was killed and Michael was paralyzed from the neck down. He was eighteen years old, didn't have any family or friends, went to West Virginia, and ended up being paralyzed, a quadriplegic.

There were low limits, Smith was clearly involved, he plead guilty and went to prison for negligent homicides. Low limits, same limits as this case, Smith wasn't insured.

Betty Moore, the least injured, the girlfriend with the facial injuries, she had her own State Farm coverage, but State Farm kept that secret. They would have paid the total for all her injuries. There was demand made on behalf of Michael Prichard.

Q We talk about "demand," is that a term of art? I didn't --

A A demand is an opportunity for the insurance company to settle the claim.

Q All right. And then what, he made demand for what?

A He made a demand to settle his claim for the $25,000 limit.

Q Even though he was a quadriplegic, he made demand for the policy limits.

[74] A That's correct. And there was no dispute that the value of his claim as a quadriplegic was worth a lot more than $25,000. He would have taken the twenty-five and given the insureds a release, and State Farm could have gotten a release for the kid and the grandmother, to make sure there was no problems in the future.

But State Farm refused to pay. They took the position, "There was three injured people, there's only $50,000, all we can give you is a third each." Even though they knew they had other coverage available to settle the claim of the least-injured person.

There were also references in the documents I reviewed to opportunities for State Farm to settle the whole thing for the $50,000. They didn't do that. They didn't keep the insureds advised, they didn't even tell the insured they could have settled the quadriplegic claim for twenty-five. It was never even communicated to them.

Q Let me interrupt you a minute. You mentioned the grandmother was the owner of the car, and the eighteen-year-old who was drinking was the driver?

A That's right. He was twenty-one, the driver. The other passengers were all teenagers, eighteen, nineteen years old.

[75] Q Did the grandmother get sued, as well as the young boy that was twenty-one?

A She did initially. She was ultimately released, before the case went to trial, from the suit, but she was sued and in the complaint for some time before that happened. The trial proceeded against Billy Smith.

Q All right.

A But what happened is, there was opportunities to try and settle it. There was invitations by the lawyers representing all the injured people and the dead girl to settle it for fifty. State Farm wouldn't offer the money. They wouldn't settle it, they wouldn't settle the quadriplegic claim in a timely fashion.

Q Did that result in an excess verdict being entered?

A It did, it went to trial, and State Farm's own attorney told them, "Look, State Farm, if this thing goes to trial, Billy Smith is going to get hit for a verdict for seven and ten million dollars. A quadriplegic, a claim of a young kid who's going to live a long time."

The judgment was entered in favor of Michael Prichard against Billy Smith for $14,509,623.06. That was the net verdict, because the police department had [76] some liability, too, but that's after getting a credit for what they paid. So that's the net judgment against Billy Smith.

Smith then filed a lawsuit as an insured, similar to this, against State Farm.

MR. CRANDALL: Objection, beyond the scope of the question. He asked if there were similar fact settings.

THE COURT: Sustained.

Q (BY MR. HUMPHERYS) Let me ask you, you've indicated that Mr. Smith is a State Farm insured.

A Right.

Q Didn't know about the chance to settle for $25,000.

A Correct. Wasn't communicated.

Q If State Farm would have settled that for $25,000, would Mr. Smith, the State Farm insured, had any excess judgment against him?

A Not for that claim, no. That quadriplegic claim would have been forever gone, no problem.

Q And did you render opinions regarding State Farm's conduct in that case?

A I have opinions, and I wrote a very detailed, lengthy written report. The case was settled recently last year, the bad faith case brought by Smith against [77] State Farm.

MR. CRANDALL: Objection, Your Honor, there's no question pending.

Q (BY MR. HUMPHERYS) What was the result?

MR. CRANDALL: Objection, irrelevant.

MR. HUMPHERYS: I think it is the very essence of the case, Your Honor, regarding our punitive damage claim.

MR. CRANDALL: Under Rule 403, 404, and 406, this is irrelevant.

THE COURT: I'll allow him to answer, it's a yes-or-no question.

Q (BY MR. HUMPHERYS) All right, do you have knowledge about what ultimately transpired in that case?

A Yes.

Q And can you relate to us what it is? Or what transpired, excuse me.

MR. CRANDALL: Objection, the outcome of the bad faith case, or resolution, is irrelevant.

THE COURT: I'll allow him to testify as to whether it was settled or went to trial or whatever, but without any explanation as to the settlement at this time.

Q (BY MR. HUMPHERYS) Okay, without giving any explanation, would you tell the jury whether it settled, [78] or whether it went it trial?

A It settled.

Q All right.

MR. HUMPHERYS: And for the record, Your Honor, I would proffer additional questions regarding that settlement, which I understand the court is not allowing us to go into.

THE COURT: Correct.

Q (BY MR. HUMPHERYS) Now, you mentioned two separate cases. Over the years that you have studied and read, and based upon your experience, your training, your education, do these two cases represent only isolated cases, or does State Farm have a widespread practice of acting in bad faith, and violating the provisions of the implied covenants of good faith and fair dealing?

MR. CRANDALL: Objection, no foundation, pattern and practice.

THE COURT: You may lay the foundation.

MR. HUMPHERYS: Okay. In addition, Your Honor, to what he's testified to?

THE COURT: Just in summary fashion, so it's brought to bear on the objection that was just made.

MR. HUMPHERYS: All right.

Q (BY MR. HUMPHERYS) Earlier -- Well, have [79] you read -- Tell us again what you've read by way of State Farm documents.

A To begin with, all of the documents in the back of the room. That's a starting place. That includes all of the manuals, or various manuals produced. Certainly not all of them, because they haven't all been produced. But as many as have been produced.

Various cases around the country, I've received copies of, and training aids and materials, and training techniques,

basically, as well as working on a number of files, some of which have settled, some of which have gone to trial.

Q You've talked about reading hundreds of depositions of State Farm employees?

A That's right.

Q You've reviewed internal documents, memorandum, communications within the company?

A Correct.

Q Do the manuals and internal documents, the sworn testimony of State Farm employees, do they give you any indication as to what the philosophy of State Farm is regarding the issues that you're going to testify here today?

A Yes.

[80] Q Do they support your opinions regarding the widespread practices of bad faith and unfair claims practices?

A Yes, they do.

Q Have you given testimony before regarding, in other courts, regarding State Farm's widespread practice of bad faith, and violating unfair claims practices?

A To the extent that I've been permitted to by the courts, I have, yes. And in depositions, as well.

Q Depositions, okay. And are these the kinds of material that you've described just now, as well as at the beginning of your deposition, the kinds of things which would lead an expert of your station to be able to conclude what the widespread practices of State Farm are?

A I believe so.

Q All right. Now, would you please relate to us your opinions regarding the widespread practices of State Farm involving --

MR. CRANDALL: Objection --

Q (BY MR. HUMPHERYS) -- involving bad faith, and violations of the unfair claims practices standards.

MR. CRANDALL: Objection, inadequate foundation. Same objection, Your Honor, Rules 403, 404, 406. No foundation regarding reviewing sufficient [81] number of claim files to satisfy the requirement that it be a reasonable cross sample.

THE COURT: Overruled.

Q (BY MR. HUMPHERYS) All right. Would you -- First of all, let me ask you, does State Farm, in your opinion, have a widespread practice of acting in bad faith, and violating fair claims practices?

A They do.

Q And now would you please give us your opinions regarding that.

A Sure. I've seen a number of different techniques that are used at State Farm, and it's not so much on individual claims files as it is in the training materials and the educational materials and the depositions given by State Farm people around the country, where they talk about what they've done and how they've been trained, including a lot of the testimony in this very trial that I can rely on of Mr. Summers and Clark Davis and Samantha Bird. There's a lot of examples that have come out in this very trial about how people are trained, and the kinds of things that they've done.

Q Are you suggesting, Mr. Prater, that all of their training material has in it items which demonstrate bad faith?

[82] A Absolutely not. No. I mean I've seen a lot of their training materials, they espouse a lot of principles that I believe in. But adopting reasonable principles and implementing them are sometimes two different things. And in practice, State Farm has a way of making things sound good, but when it comes to the actual implementation, they're not implementing what is good, what is fair, what is right.

Q We'll talk more about that in a minute. Now, as to your opinions of what they do, the techniques that they use,

could you explain now, taking one opinion at a time, and we'll discuss them in detail.

A Well, there's three things that I'm prepared to talk about today in that regard. One is their utilization of first call settlements.

Q Let me do this, if I could, Mr. Prater. I think you prepared these three items you're about to talk about, and I have made an overhead of them. We'll just put them up so we can talk about them one by one. You started to address the first one?

A Right.

Q What is it again?

A Utilization of first call settlements. This is a concept that has good and bad. I mean it's a good concept to try and settle claims on a first call basis, [83] if you do it promptly and fairly and fully.

But there's been plenty of testimony, including in this trial, that that's not why State Farm really wants to do the first call settlements. They want do them so they can pay less than the value of the claim, or pay people off before their symptoms manifest, before the soft tissue injuries become known, and they start going to doctors, or getting lawyers. So they can save money by trying to get an early release or an early quick contact settlement.

And this is something that, throughout all the State Farm training material, the State Farm people are trained and pressured to do, is increase their number of first call settlements. Get out there, settle.

And it sounds good on the surface, and it is good in many cases. It works well for many people, but to many it doesn't. And it's a matter of keeping them from getting lawyers. It's one of the hidden purposes that State Farm doesn't want to talk about, is that their first call settlement program, and we can talk more about that, the Bodily Injury Proficiency

Program, is to obtain and seize control of unrepresented people, and to pay them money, and if you can, get a release, and put the claim to bed as quickly as possible before [84] the injury is manifest.

Q We'll talk about that in additional details in a minute. The second item.

A The second item, it's related, in a sense, to the first, is a State Farm practice that I've seen of trying to control claimants. And certainly, in some cases, insureds, to keep them from getting lawyers who might give them legal advice.

Lay people don't understand all the nuances. If they go to lawyers, I think it's already been testified to in this trial that the cases cost more if people go to lawyers. And so they try and settle them for less, and they have ways of, you know, looking good and trying to offer some quick money to somebody so that you can control them and keep them from getting lawyers.

Q Your third item?

A The third area is something I've seen in many cases that's been troubling to me for a long time, is State Farm's use and cultivation of biased, predictable experts. We've seen it in the third-party case in this case, as well as in first-party cases. I've seen it in a number of cases that I've been involved in.

And State Farm personnel across the country have testified in depositions that first-party claims and third-party claims, they handle them essentially the [85] same. So it's a practice that I've seen that causes me great concern, I've talked about it before in other depositions, and I hope to talk about it a little bit today.

Q All right. Now, I'd like to go through each of these three items in a little bit more detail. You've explained what each are. Going to the item number 1, utilization of the first call settlements.

A Correct.

Q Now, I don't want to go through Article 12 of the claim superintendent's manual again with any great detail, because we've read that. But briefly summarize how that Article 12 applies to this issue.

A Sure. It talks about, gives techniques to go out and negotiate claims. Negotiation can be good and it can be bad, it depends on how you do it and what your purpose, or your focus is.

They talk in the Article 12 about trying to build trust, and if you know you want to offer low in the range of value. And they point out to people that many claims, liability claims, settle for the amount of the actual loss, that over 50 percent settle for just your medicals, even though people may be entitled to more that they're not aware of.

It encourages people to try and go out and [86] settle for medicals only, and pay the bills and say, "Sign this," before people get legal advice and find out they're entitled to additional damages.

It talks about possible situations, and gives people advice on how to handle them. For example, it says that if the opening demand, the offer to settle is reasonable, evidence reluctance, and accept it if you can't reduce it further. Now, why would a --

Q Let me put that up on the screen. That is one part of the article which I don't think has been seen by the jury yet. This is Article 12, 1983 version, page 10. Explain to the jury where you're talking about.

A Let's see --

Q Right here. "Where claimant's demand is within your valuation"?

A Get it where you want it, and then reluctantly accept it. There's another provision that talks about if a reduction is imminent. Somehow a claimant expects to bargain. There's several pages to this, I just have notes of some of the concepts.

If there's a reasonable demand made, you pay it. You don't hold back and expect to bargain. They talk about a concept in their manuals called horse trading, engaging in horse trading with people and with [87] lawyers. And my opinion, that's always been with horses. That's not okay if you have a fiduciary obligation to yourself.

It should be, if you have a, if you control the cards and you control the checkbook, it's not a real fair negotiation process. It's whatever the State Farm person wants to do, that's what's going to happen. So if a reasonable demand is made, and why would you instruct your claims people to reluctantly accept it, or to bargain with them, or to horse trade?

There's lots of suggestions in the manual, what I call "let's make a deal" suggestions, techniques they use in negotiation to pay less than what might be a reasonable value. Something that's requested.

Q Let me just interrupt you for a moment again, and indicate, here, on page 11, "aids in reducing demand." And it talks about various ways that the adjuster can use to reduce what the claimant is requesting.

THE COURT: For the record, Mr. Humpherys, isn't that 22?

MR. HUMPHERYS: I'm sorry, no, it is page 11 of Article 12.

THE COURT: You're talking about the page --

MR. HUMPHERYS: It's trial Exhibit 120, and [88] that's in Exhibit 56. Thank you, Your Honor. Trial page 120.

Q (BY MR. HUMPHERYS) Okay, and the following page behind that lists a number of ways to talk about how to get the claimant to reduce their claim.

"Pain and suffering are temporary, pain and suffering, how measure in dollars, subjective complaints difficult to evaluate, raise an optimistic attitude. That the recovery is

non-taxable, discuss contributory negligence." Is that what you meant earlier by comparative negligence?

A Correct.

Q So that is asserting that the person who's making the claim is partially at fault?

A Yeah. If the law allows it, there may be valid contributory or comparative offsets, but if it doesn't, you shouldn't do it. If you don't have good basis, you can't just get numbers and use it as a negotiating tool. You really have to check it out and make sure there's a good basis for it.

Q If it's a child's claim, talk about an unavoidable accident. One should not profit from misfortune. Damages, not a penalty. Similar cases. Litigation is undesirable.

A That just gives some ideas. And there's [89] other negotiating tactics in there. This whole concept of horse trading that you see again and again, and it's referred to by adjusters.

MR. CRANDALL: Objection, I don't believe there's a question pending.

THE COURT: Sustained, Mr. Humpherys.

Q (BY MR. HUMPHERYS) I'd like to ask you, as it relates to W. For example, worker's comp awards for comparison. Is it appropriate to use worker's compensation awards as comparison for what a bodily injury claim is worth?

A Probably not. There's different kinds of insurance. When you look at bodily injury claims, you look at other bodily injury claims to compare and see what they're worth.

Q They indicate to be sympathetic, sincere, understanding, that it's very important. We've seen other techniques that have been used. Now, Mr. Prater, some of these techniques are not improper, are they?

A No.

Q Have you found, however, that the use of these techniques have been improperly used on a wide scale basis at State Farm?

A Yes. And there's been testimony at trial in this case about that.

[90] Q Now, this is a superintendent, claim superintendent's manual. Would the adjusters be privy to this manual?

A I don't know if they see it or not. My understanding is that it's for the superintendents, and they probably wouldn't typically see it. But the superintendents would be using that as part of their training which filters down to the line staff.

Q Does this article deal with PIP, or no-fault claims, or liability claims?

A I don't believe it does, I think it's just bodily injury. That's my recollection of it.

Q Now, it's totally appropriate to settle a no-fault PIP claim for the amount of the medical expenses, assuming they're below the threshold.

A Yeah.

Q Now, are these -- Does this article have to do with that?

A It doesn't appear to, no.

Q Okay. Is it inappropriate, Mr. Prater, to settle for medical expenses only, as indicated 50 percent of these cases do, if it's a liability claim, where general damages, lost income, and other such things are awardable?

A It wouldn't be proper to settle with somebody [91] under those circumstances unless you told them that they're entitled to more, so they could make an informed decision. It wouldn't be proper to say, "This is all you're entitled to get," or to not tell them that you may be entitled to additional damages, or that, "Gee, that neck injury, you know, could turn into something else later, that closed head injury could result in problems later."

I mean that's not the fair way to do it. If somebody wants to take less than they're entitled to, that's okay, as long as you fully disclose to them that they may be entitled to more, so they can make a good choice.

Q Here's, on page 9 of the article, trial page 118 of Exhibit 56, it talks about a specific item, it says, "Do not discuss policy limits." And then down below, "One price demand." Could you just read that to us?

A Yeah, "Be slow to accept this concept. Most persons expect to negotiate, disappointed if you don't, feel cheated if you accept demand too readily."

Q "If the claimant is sincere, test demand against your evaluation"?

A Yeah. You want me to keep reading?

Q No, that's all right. Are these proper [92] techniques, based on the covenants of good faith and fair dealing, and the fair claims practices act?

A Depends on which ones, and how they're used. And how they're implemented. Some of them sound really good on their face, and some of them are good, and part of a good faith negotiation, and some of them are not.

There's another one in there about making exorbitant demand, if there's an exorbitant demand don't make an offer. I don't know if it's on your blowup there.

Q I think it's on the following page, if I'm not mistaken. Well, I think we've seen a lot of it. But there is a particular section regarding -- What if a claimant makes an exorbitant demand? What does it instruct the claimants to respond?

A It says, "Make no offer."

Q Now, is that appropriate?

A No.

Q Why?

A No, it's not. And I think Samantha Bird talked about that, that when you're in the insurance business you have the duty, no matter what the demand is, no matter how high it is, to fairly and properly evaluate a claim, and to make a reasonable offer. It's an affirmative obligation imposed on us in the insurance [93] business as a privilege for being able to be in the business.

We're supposed to be the experts, we evaluate the claim. If they demand a billion dollars and the claim's only going to be worth $10,000, that's not when you say, "We're not going to give you a dime."

Q I think I'd like to draw your attention to this point on the abuse of first contact settlements to another PP&R which the jury has not seen. This PP&R is of Brad Partington, even though his name is redacted, and he was a claim superintendent.

Let me draw your attention, now, to -- By the way, this Brad Partington's PP&R, the specific page I'm referring to is the Bates stamp control number 5843, and it's contained in the exhibit of Mountain States PP&Rs. Here's Mr. Partington's name at the top.

On number 4, let's just review that together. "Obtain an average of 20 early settlement contacts per month." Is it right, Mr. Prater, to tell an employee of State Farm how many first contact settlements there should be, even before he knows whether it's appropriate or not to settle?

A It doesn't make sense to me to put that kind of an expectation on somebody, because it might encourage somebody to go out and use improper techniques [94] to meet the goal. It doesn't mean they'll do it in every case, but it's the kind of thing, you don't know what's going to happen in the future.

We don't have crystal balls that tell us everything. And to put those kind of goals on somebody -- And it doesn't say how to do it. You know, it doesn't say, "Go out and do bad things," but in practice, and in the testimony we've heard, the verbal training is, "Go out and take advantage of people." Bruce Davis is an example.

Q All right. Let's look at, now, the review comments made by his superior. It indicates that he's below goal. What does that mean?

A That means he didn't meet the expectation in his PP&R. And that's a critical comment, that he didn't make his goal, his PP&R goal.

Q "Unit 624 has had the following early contact settlements." And it lists which ones they are.

A Right.

Q The superintendent continues to emphasize the importance of ECS. Is that early contact settlements?

A Correct.

Q The reduction in frequency has had some impact on ECS. Is this an example of how the State Farm management puts pressure on the lower management to [95] accomplish the goals?

A It creates the expectation. It doesn't tell you, "Were those fair? Were those properly done or not properly done?" I mean the detail isn't there. You have to look at actual examples of things that they've done, and read the testimony of the people that were trained, and to how to accomplish those goals. Like Bruce Davis in this trial, and others.

Q Okay.

A In order to understand, flesh it out.

Q Now, have you reviewed the BI Proficiency Program? Are you generally familiar with it?

A Yes, I am. I've reviewed many references to it, and various documents.

Q Is that a relatively new program presented by State Farm to its claims personnel?

A It is, I believe. Relatively new in the last ten or so years. I could probably tell you when it was introduced. It appears to have been within the last five years or so.

Q All right. And what, if anything, does the BI Proficiency Program teach regarding first contact settlements?

A Well, there's several purposes espoused in the program, and two of the primary purposes, it seems [96] to me, from what I've seen, is to keep people from getting lawyers or legal advice, to control them, get out there and contact them quickly before they get lawyers.

And secondly, to get statements from people, get photos of cars, low impact accidents, get early photos and early statements. And getting photos isn't necessarily a bad thing, as long as you're taking a fair photo. Getting early statements can be good or bad. But if you're using it so you can go to them, "Are you feeling fine? Sign a statement." And three days later they say, "I hurt," that's not a proper purpose for taking an early statement.

And there is a reference in an "Obiter Dictum" in 1991 that --

MR. CRANDALL: Objection, beyond the scope of the question.

Q (BY MR. HUMPHERYS) Let me do this first. Have you reviewed certain material and publications of State Farm which describes the purpose of the BI Proficiency Program as it pertains to your testimony?

A Yes, I have.

Q And does that include the "Obiter Dictum"?

A It does, as well as other documents.

Q Okay. Would you please tell us about the [97] publication "Obiter Dictum" that you were about to comment on.

A Well, there was an "Obiter Dictum," I believe in October of '91, that says, "We have to give our defense counsel ammunition to fight with, and that is why we are introducing the BI Proficiency Program."

Q Mr. Prater, you mentioned earlier that one of the duties of an insurance adjuster is to try and find coverage.

A Right.

Q Is this admonition, or this direction, to find ammunition to fight with, consistent with the duty to try and find coverage?

A To act fairly, no. It doesn't seem to me to be the right reason.

MR. CRANDALL: Objection, vague and ambiguous, and it does not indicate first party or third-party claim.

THE COURT: Clarify, have the witness clarify.

Q (BY MR. HUMPHERYS) All right. Does it make any difference whether it's first party or third party, as it relates to the opinion you just gave?

A There's a difference between third party and first party. Certainly in a first party case, when you [98] pay the premium to your own company, you don't expect your own company to fight you, when you're paying the premium for the coverage, and there's that relationship that exists, because you're paying for the coverage directly.

And in a third-party setting, sometimes it's appropriate to fight against claimants, depending on the facts and circumstances of the case. Certainly more appropriate than in first-party cases, but you're still supposed to be fair to the third-party claimants. We saw that earlier. You still have a duty to be fair, and offer fair value, even in the third-party case. It's different than first party.

Q What are CORs? I'm just going to write that down, because we're going to talk about a bunch of those. What is a COR?

A A COR is a claims operation review. It's something that's done periodically in the various regions, where the home office people will come out and basically do an audit of what's going on in the region, and how claims are being handled, and lots of other considerations.

It's kind of a critique tool that's used to advise the managers and the regional vice presidents about what the

home office's view is of what's going on [99] in their region, what they're doing well, and what they're not doing well.

Q Are the uppity-ups, clear up to the vice president of claims, involved in many of these CORs?

A Yes, they are. They're the top level managers are involved. They're either copied on them, they get copies of them, as well as the regional vice presidents, or sometimes they actually go to, taken like the Macherles, and the high level people. Mr. Comella frequently does claims operation reviews.

Q Have you read some CORs that pertain directly to the point you're making regarding first party contact settlements?

A Yes, I have.

Q Would you please tell the jury what there is in a COR, or any COR that illustrates the point you're making?

A Sure. There's a number of them that say this. This is one from Woodland Hills in 1992. It states in the COR that, "As a general State Farm claim organizational tool, we should be working to eliminate the perception on the part of the claimant of the need to obtain counsel in order to bring about a favorable and equitable settlement of their injury claim. Adherence to the standards and time frames suggested by [100] the Bodily Injury Proficiency Program should provide a significant tool in reducing attorney representation."

Q Is there another comment in the COR regarding that?

A "As a continuing standard, we suggest that with early personal contacts and the use of medical authorizations, provides an opportunity for the claims rep with an unrepresented claimant to establish communication and rapport. This process must be turned into a positive portion of the initial investigation, and an opportunity to gain the trust of the claimant."

Q All right. Now, I'd like --

MR. CRANDALL: Can you give me a page citation, counsel?

MR. HUMPHERYS: Page citation?

MR. CRANDALL: To this claim --

MR. HUMPHERYS: I don't have the page. I'm sorry, counsel.

MR. CRANDALL: What Exhibit?

Q (BY MR. HUMPHERYS) Do you have the CORs with you, or stack of them there?

A I have over a hundred of them. That note says it was from Woodland Hills, COR 7-24-93. I think I have reviewed over a hundred of them. And that comment is in several of them.

[101] * * *

Q (BY MR. HUMPHERYS) Now I'd like to draw your attention to the item number 2 which is up here. We've got this on a slant, so it always looks like it's about to fall over. Practice of controlling claimants. Now, part of that I think we've already covered.

A Right.

Q Have you seen anything in the Campbell file which would indicate to you that State Farm exercised the, quote, control, end of quote, over Mr. Campbell that you have been describing?

A Well, again, I think this previously indicated, this has come out in this trial. They were kind of falsely assuring him that he had nothing to [102] worry about, and he really didn't need a lawyer, because he had enough insurance. And from what I've heard of the testimony, that's kind of the flavor that they told him, "Don't worry, it's going to be okay. Mr. Ospital's, you know, at fault, he's going to lose." Kind of just lulled into this false sense of "everything's going to be okay."

Q Have you had other cases, either first or third party, where similar kinds of, quote, control, end of quote, has been used as a technique to try and take advantage of claimants?

A I've seen it represented in the manuals, and I may have been involved in other cases, but I don't recall any specifically. I've seen it talked about, and again, the CORs I think are really, they really illustrate it in terms of how important this is to State Farm to seize and control, keep people from getting lawyers.

Q All right. I would, for the sake of time -- Let's not go into all the CORs that talk about that. Let me draw your attention to the term "tough negotiations." Have you seen that term used by State Farm?

A Yes.

Q And have you seen that used in order to avoid [103] paying fair claims, fair value on the claims?

A The encouragement to engage in tough negotiation?

Q Yes.

A Yes.

Q And can you give us an example of that?

A From which case? A particular case?

Q The Zilich case, for example?

MR. CRANDALL: Object, Your Honor, reference to other cases, irrelevant.

MR. HUMPHERYS: It has to do with punitive damages, Your Honor.

THE COURT: Overruled.

THE WITNESS: Sure.

Q (BY MR. HUMPHERYS) Would you please describe briefly what occurred in the Zilich case that illustrates this issue?

A Sure. The Zilich case was the case I was involved in that went to trial, and to verdict, which suggests that even when people do get lawyers, they can't keep you from getting

a lawyer. And you get one, they still engage in these tough negotiations, and that they will refuse to pay the fair value of a claim, even when an attorney's involved, if the attorney refuses to negotiate.

[104] The Zilich case was a case that went to trial, actually in February of this year. The facts were simple. Kimberly was involved in a serious accident in 1984, with underinsured drivers. There were a bunch of kids at a Taco Bell, and they were drinking, and they decided they wanted to go drag race.

And Kimberly and her boyfriend, who she hoped would become her husband, they were coming back from a concert, it was an Elton John concert, and they were driving down the street, minding their own business, and these drag racers plowed into the side of the car.

Her boyfriend was killed in the accident, they worked together, they were very close. Kim was severely and permanently injured, she had diplopia, had in her eyes vision problems, disfigurement damage to her face. The people involved didn't have enough to compensate her. She made a claim against State Farm because she had over her own coverage available.

The value of the claim was always worth more than her limits. The highest offer that State Farm would make to settle was $55,000. State Farm's own counsel handling the case recommended to State Farm that they offer more, but State Farm refused to do so, because the attorney refused to negotiate. The horse trading concept, again.

[105] I think the attorney said we should at least offer seventy-five, and State Farm said, no it was worth more, but no, we won't negotiate, we're going to stick with our offer and take it to an arbitration.

So they acted in bad faith by refusing to settle the case, they forced it through arbitration, they delayed the resolution

of the case by insisting on the arbitration, which was time consuming, it's harassing. People don't like to go to court to have to get their benefits, and that's not what you expect when you buy insurance. You've got to go to court because you're not getting a fair offer.

The arbitration award was $387,500, less the credits from the other people's insurance, which was 146, which meant that the value of her UM claim, as determined by the arbitrator, was $241,500, when she only had $100,000 in limits.

After the arbitration they took the position, "Well, what's the big deal? Here's the hundred, you know, now give us a release on the bad faith claim," which they weren't entitled to. And so that's basically the facts.

Q All right. And did you give -- Well, let me back up. Does what you've described illustrate how State Farm uses these tough negotiation practices in [106] refusing to settle claims?

A Yeah, I've seen it evident in many files, the same kind of delay, drag it out, make you jump through the hoops.

MR. CRANDALL: Objection, beyond the scope of the question, move to strike everything beyond "yes."

THE COURT: Sustained.

MR. HUMPHERYS: It was in the scope, but I'll ask it this way.

Q (BY MR. HUMPHERYS) Have you seen it in other cases?

A I have.

Q Have you seen where the claims management compliments and encourages this kind of activity?

A Yes, in terms of paying less than fair value.

Q I want to draw your attention now to one of the CORs, the Mojave North, August 13, 1990. On the following, or the page following that, as part of that report, I want to come down here to a portion. Now, so that we understand the context, do those that are in charge of the CORs, do they analyze various cases and point out faults, or compliment proper claims handling?

A They do. They analyze the strengths and weaknesses, so that local management can develop action plans to get within their organizational goals.

[107] Q What I would like to have you do is read this particular paragraph.

A It gives an example of a file by number that says, "This file was well handled. It was an assigned risk claim where our policy holder backed out of her drive into the side of claimant's car, which was driven by a twenty-two year old. She had $5,085 in specials."

Q What are specials, again?

A Medical bills or lost wages, hard dollar damage.

Q Out of pocket expenses?

A Out of pocket.

Q Okay.

A There was a demand of $25,800, and an offer of $5,500. Just slightly over specials.

Q So State Farm offered $5,500 to settle the case?

A That's right. "We agreed to binding arbitration at JAMS," which is a group of ex-judges that do arbitrations, "for $5,500 low and $15,000 high." Which meant they structured a deal that they'd have a high-low agreement that the arbitration award, they would pay at least $5,500, no matter what the award was, and no more than $15,000."

So they entered into this agreement in [108] advance of the operation, the high-low agreement, and the arbitrator decided it and within those limits, that's what they would have to pay.

"The award was $11,467, which was $5,085 plus $6,500 for pain and suffering. Pat apparently represented State Farm, and the attorney was mad because he didn't get $15,000."

Q All right. Now, what I would like to draw your attention to is the offer of $5,500, you said was essentially a little bit over special damages.

A That's right.

Q But the arbitrator awarded $6,500, in addition to pain and suffering?

A That's right.

Q Until -- "This file was well handled." Mr. Prater, do you believe this file was well handled, when they only offered $5,500 and forced it to arbitration to get the additional sixty-five?

A No, that is not what I would consider an example of a case that was well handled, because the value of the case is eleven-six, their offer was fifty-five, and they think that's good. That's not good.

Q Is this the kind of encouragement that you have seen in the various kinds of communications at [109] State Farm regarding tough negotiations?

A People tend to be praised for keeping their payments down, and criticized if they pay too much.

Q Have you seen in these CORs stressed the importance of controlling, or managing defense counsel who are representing the insured?

A Yes.

Q I'd like to draw your attention now to another COR. This is a COR of Northern California Metro Golden Gate in 1989. From this particular COR, I'd like you to -- This was in 1990, I'm sorry, from the Northern California Sierra Pacific East. Would you please read this paragraph starting, "A key management responsibility."

A Sure. "A key management responsibility in litigation management is the assignment letter."

Q What is the assignment letter, first of all?

A The initial assignment letter that's sent to defense counsel to defend an insured who has a bodily injury claim being brought against them.

Q The assignment by State Farm of the file to the attorney.

A The attorney that they hire to defend the insured.

Q All right, go ahead.

[110] A "Such letters should reflect the goal established by management for the defense attorney."

Q What goal are we talking about? State Farm's goal?

A State Farm's goal. That's right.

Q Is this stating that the letter that assigns the case to the lawyer needs to specify the goal that State Farm has?

A That's correct.

Q Okay. Go ahead.

A "The goal could be to answer the lawsuit and wait for further direction, because we may think we have a settlement, or the goal could be one of using the attorney to bring about a settlement. Another goal could be, a possibility should go to arbitration."

Q Drawing your attention, "Our goal may well be trial."

A Right.

Q Was that the goal that was applicable in the Campbell case?

A It certainly seemed to me to be the goal, yeah, and the decision that was made early on.

Q "A case may be one we view for a liability defense."

A Right.

[111] Q Now, again referring to this assignment letter up here in the next paragraph, it says, "This is not intended

to be merely self-serving for this company. It is intended to place accountability on our defense attorneys."

A Right.

Q Mr. Prater, is it appropriate for an insurance company hiring defense counsel to impose that type of accountability on defense counsel to follow what they are directing to be done?

MR. CRANDALL: Objection, calls for a legal opinion, Your Honor.

MR. HUMPHERYS: He is a lawyer, Your Honor. He teaches law, and insurance law. Let me lay a little bit of foundation, maybe I can resolve this.

Q (BY MR. HUMPHERYS) In your insurance classes where you're teaching law, do you also address the issue of defense counsel for the insurance company?

A I do.

Q And do you discuss and teach the duties of defense counsel as it pertains to which, who they owe the duty to, the insured or to the insurance company?

A That's correct.

Q All right. Now, I'd ask you the question again, and see if I can word it a little better. Is it [112] appropriate for an insurance company to make defense counsel accountable to the insurance company for what it is going to do in following the insurance company's goals?

MR. CRANDALL: Objection, calls for a legal opinion.

MR. HUMPHERYS: I'm asking now for a legal duty, I'm not asking for an interpretation of the law.

THE COURT: I'll allow it. Overruled.

THE WITNESS: The insurance company shouldn't be giving the direction to the defense attorney, or what they want done, out of the gate. They should be assigning competent counsel to defend the insured, and that counsel owes their duties primarily to the insured, not to the insurance company.

There are duties that sometimes have been called a tri-part-type relationship, where you're supposed to be fair as to the insurance company and your client that you're representing. But your paramount duty is to defend vigorously, or to represent, whatever that means -- You know, maybe settling is the right thing to do. You represent your client, and that's what you're required to do as a lawyer, and the insurance company should allow you to do that, not give you direction or try and control you.

[113] Q (BY MR. HUMPHERYS) Did you find that State Farm in the Campbell file -- Or what did you find in the Campbell file? I'll ask it in a non-leading way. What did you find in the Campbell file as to whether or not State Farm was having Mr. Bennett accountable for its direction to defend and try the case, as opposed to settle it?

A My recollection is, is that insurance company talked to Mr. Bennett, and then some letters were written, kind of self-serving letters, saying, "We agree this is a case to defend," before Bennett sees the file. There's a letter, it seems like those are his marching orders, that this is a case to defend, from the company. When clearly it was not a case to defend.

Q Is it appropriate for the company to exert that kind of influence on defense counsel?

A No. This case should have never gone to trial, it should have been settled. Defense counsel should have just settled this case.

Q I want to draw your attention to another COR of 1989 in the Northern California Metro Golden Gate. I would like you to read, if you would -- This pertains to advising, or keeping the insured advised with correspondence. Would you please read that first paragraph?

[114] MR. CRANDALL: May we have a page, or an exhibit number?

MR. HUMPHERYS: It is page 9300, if we can see down here at the bottom. You're welcome to have copies of this. Do you want me to give you a copy right now to follow along?

MR. CRANDALL: Thank you.

MR. HUMPHERYS: You bet.

THE WITNESS: "Keeping the insured advised is providing good claim service. It is not intended to be simply a self-serving exercise for the company."

Q (BY MR. HUMPHERYS) Let me stop you right there. What does it mean to you as an insurance expert when they say, "It is not simply, it is not intended to be simply a self-serving exercise"?

A It means to me that that's one of the purposes, but it's not the only one. It's a good thing to do, and it's also helpful, self-serving.

Q Have we seen manuals, such as the Excess Liability Handbook, regarding self-serving documents?

A Yes.

Q And is that appropriate in your opinion?

A No. I think the file should reflect the truth, and you should forget about trying to put things in there that are self-serving, or you think, well, you [115] can use in a later trial in front of a jury.

Q Okay.

A The file should accurately reflect the truth.

Q All right. Now, rather than go through any more of these, let's move on now to another subject. By the way, on those CORs, did the plaintiffs in this case request that State Farm produce the CORs out of the Utah prior to 1990?

A That's my recollection they did, yes.

Q And did they, did State Farm ever produce any?

A Not to my knowledge.

Q Were you able to find one of them, however, through another source?

A I did.

Q And just tell the jury how you went about and found that.

A I received a telephone call about two weeks ago on a case up in Washington State where I was asked to act as a consultant in a class action against State Farm, a certified class action, and they sent me down some documents to look at. I didn't commit to taking the case, but I looked at the initial documents, and attached thereto was a COR, claims operations review, performed in Utah in 1989.

[116] Q Does it have some aspects in it that you found troubling and inappropriate?

A It did.

* * *

[117] * * *

Q Yeah, let's go to the third item, now, which we had up here. "Cultivation or development of predictable biased experts."

A That's right.

Q In your opinion does State Farm engage in cultivating and developing predictable experts that they use in litigation?

A That's right. And more importantly than that, Mr. Humpherys, it's not just in litigation.

MR. CRANDALL: Objection, Your Honor, beyond [118] the scope, move to strike. He's answered the question.

THE COURT: Sustained.

Q (BY MR. HUMPHERYS) I'll ask you the question. More importantly, do you have an opinion?

A Yeah.

Q And would you please state it.

MR. CRANDALL: Objection, ambiguous.

THE COURT: Excuse me, I didn't hear the colloquy.

MR. HUMPHERYS: The following question was, would you please state what your opinion was, that you thought more important than the answer to my prior question.

THE COURT: Okay, proceed.

THE WITNESS: State Farm, using a predictable expert in a third-party case, depending on how it impacts the insured is one issue, but something I've seen a lot that's very troubling is their use and their cultivation of primarily doctors to do what they call IMEs, independent medical examinations, in first-party cases, where you're filing a claim against your own insurance company, like for those UM benefits, uninsured motorist benefits.

And what State Farm does routinely is, it goes out and it recruits --

[119] MR. RANDALL: Objection, Your Honor, irrelevant, implication of third-party case.

MR. HUMPHERYS: It has to do with punitive damages and the widespread use.

THE COURT: And I'll allow it. Overruled.

Q (BY MR. HUMPHERYS) Go ahead.

A They recruit and cultivate medical doctors who will provide testimony that will enable State Farm to reduce the amount that they offer on claims by getting medical doctors that they hire hundreds and hundreds of times, who write predictable reports to basically say, "Oh, the injury's not that bad," or, "It should have gotten better by now," and use that as a bargaining chip to try and pay people less than the fair value of their claims.

This is in a first-party context, this is something you wouldn't expect your own insurance company to do, to focus on ways to reduce your claim and to pay you less than fair value. And it's my view, as I've testified in the past, and I've worked on a number of cases that State Farm cultivates and

uses these doctors, and other experts in other cases, but we're talking about auto cases, as I understand it, and not earthquake or homeowners.

Q That's right.

[120] A That they use these doctors, and they recruit them, and they develop them, and they try and call them independent, when they know they're not independent. And State Farm is very critical of plaintiff's lawyers and doctors working together, in all of their publications, they're encouraging get more IME doctors, recruit more, cultivate more of these people to help us, basically, save money on claims.

They say, "But look out, it's a double edge sword." But what they think is, if you have a plaintiff's lawyer, and they go out and use the same doctor repeatedly, if they see the same doctor, and the same plaintiff's lawyer bringing cases against State Farm, they view that as a fraud, they view that person as a fraud.

Q Let me stop you right there. You mean if I were to be asking a doctor to testify for my client in more than a few occasions, that I would be a suspect of fraud?

A That's right, it would be a red flag indicator to a State Farm claims handler that you are a fraud. They may assign you to a special investigation unit, there's a lot of techniques they use, and they consider that fraud. They report suspected frauds routinely with no criticism to a big computer that's run [121] by the National Insurance Crime Bureau, where they put your name in the computer, and you stay there forever, you and your attorney, as potential frauds.

Because if you happen to hire an attorney that's had a lot of claims against State Farm and they use the same doctor to evaluate people, on five or more times, or several occasions, your name will get reported into this computer system and it'll stay there. And they're encouraged to do that, to report these suspect fraud cases.

Q But if State Farm uses the same doctor for hundreds and hundreds of times in cases, do they consider that a fraud?

A No, they don't. And that's the problem. What's good for the goose is good for the gander. They don't look in the mirror and consider what they do as fraud. They don't consider that as fraud. They can hire a doctor, and I've seen cases where they've hired the same doctor a thousand times, or 800 times, and they give predictable reports.

And I can give you some examples, and that's one of the facts that occurred in the Singh case, which we'll be talking more about, I guess.

Q Let me ask you. Are there actual publications, are the kinds of things that you're [122] describing right now published in written form within the State Farm organization?

A Yes, they are. Several different periodicals.

Q All right. I don't want to get into all of them, but can you give us a flavor? I'll ask you give us some examples of publications that stated as you have just been describing.

A Sure. In the "Obiter Dictums" over the years there's references to what State Farm calls medical cost management. And there's good ways to manage medical costs, and good ways to keep costs down, and that's not a bad thing in and of itself.

But the technique that, one of the techniques that State Farm uses is using and recruiting IME doctors to do that. And they talk in their "Obiter Dictums" about how we want to send plaintiff's lawyers a message, State Farm plays hard ball. This is in April of '87, the "Obiter Dictum." The final word, from the head people at home office.

"The key to winning litigation is to produce expert witnesses who can support our position." And then in the October '90 one, they point out, "State Farm is suffering underwriting losses

in the late '80's. And the public won't tolerate increases. Therefore spending [123] controls are required." In other words, claims payments. And then the question --

MR. CRANDALL: Objection, no foundation, calls for speculation. I move to strike.

MR. HUMPHERYS: Your Honor --

MR. CRANDALL: The meaning of spending controls.

MR. HUMPHERYS: He's talking specifically about a publication, and he's discussing the very items of the "Obiter Dictum." I don't know what he means by lack of foundation.

MR. CRANDALL: I have no objection to quoting "Obiter Dictum." It's the witness' interpretation as to what is meant by, quote, spending controls.

THE COURT: Sustained.

Q (BY MR. HUMPHERYS) Let me ask you about spending controls. Have you read other publications and other documents which give you the meaning of spending control, as it relates to State Farm's use of the words?

A I'm sure it can relate to a lot of different concepts, but we've seen several examples of spending controls being related to claims payments.

Q Have you actually seen documents that relate the two?

A In those words or similar words, yes.

[124] Q Have you seen testimony that relate the two?

A Yes.

Q Have you seen cases where they have been related?

A Yeah, I mean that's the flip side of insurance. Taking the premium, spend the dollars. I mean that's --

Q All right. Now, would you continue on with your explanation.

A Yeah, in that particular one, it asks people, "Is your investigation focused to whatever our best line of defense is?" And remember, that's an improper bad faith focus in the first place.

MR. CRANDALL: Objection, Your Honor, beyond the scope of the question.

MR. HUMPHERYS: This is right directly on the scope. I'm asking him examples of what it is that he found improper on this issue.

MR. CRANDALL: I have no objection to the responsive answer, it's the following lecture that's non-responsive.

THE COURT: I'm going to sustain the objection. I think the answer should be confined precisely to the question, and not an editorial as to what the interpretation of the answer that he's giving [125] is.

Q (BY MR. HUMPHERYS) All right. Now, what I would like to do on that last point, in light of the sustaining of the objection, is to ask you, in your opinion, is that proper, and if not, why? As you were giving your explanation that was objected to?

A And I've lost the thread, so maybe you can help me.

Q Well, you know what, I've lost it too. The objection worked.

MR. CRANDALL: My note says we were talking about spending controls.

MR. HUMPHERYS: But it was after that. Well, let's move on.

Q (BY MR. HUMPHERYS) All right, now, did you find examples of using predictable, or biased experts in the Campbell case which you thought were improper?

A Well, clearly we had a situation where I believe it was Mr. Dahle.

Q Dahle. Bob Dahle?

A Where clearly State Farm, and through Mr. Bennett, was attempting to develop him as an expert for State Farm, to use not only in this case, but in future cases.

Q Did Mr. Bennett actually indicate he was [126] trying to, quote, develop, end of quote, Mr. Dahle?

A Yes, he wrote to Mr. Noxon on 9-25-81, I believe, and pointed out that we were going to try and develop this guy as our expert. You know, and then see, Bennett's trial notes, too, when he was working -- There's no question, I'll stop.

Q All right. Are there other examples of how developed experts were used in the Campbell file?

A Well, clearly they were trying to develop him, and hoping to help him see the facts the right way. Because in Mr. Bennett's notes, I don't know if there's been references to it, I can't remember in this trial yet or not, but Mr. Bennett felt he could be used to good effect at trial, but they had to go over his testimony and coach, and kind of rehearse the expert's testimony a number of times to have him avoid saying things such, "As Campbell was right in the thick of it," "Campbell caused the accident," things like that. Which suggests that there's some cultivation going on, there, of that particular expert.

* * *

[127] * * *

Q Is that an appropriate thing to do, based on your experience, knowledge, and training, either in behalf of the insurance company or defense counsel, to try and develop an expert who has expressed an opinion, such as Mr. Dahle, and then turned around and changed it?

A Right, and I think it depends on each case to a certain degree. It's never proper to develop experts to be predictable, biased experts in a first-party setting. In a third-party setting, such as this, it's not proper to put a predictable expert, when the effect of that is you're gambling with your insured's well-being and peace of mind.

In other words, if you have an expert you're [128] hiring, like in the Campbell case, to get on the stand and testify to something that maybe that expert doesn't even totally believe in, to develop and get that testimony out of him, when it's pretty clear that he was saying things that suggested Campbell was partly at fault, that what you're doing when you do that is, you're putting your insured at risk.

You're picking an expert that you're cultivating, and you're, in a sense, using your insured as a Guinea pig, you're going to try to win a case that you know is not that strong on the other side, that you've got other experts, that State Farm used the other experts before these were reputable, credible people, and you don't play experiments like that with your insured.

Q Are there other publications which evidence what you've been talking about regarding documents and other predictability experts, other than the "Obiter Dictums"?

A Yes, we see the same references in the president's forecasts, where the president is, you know, sending the message that we have to get involved in medical cost management, that we should use the PP&R process to make sure that people are accountable, we have to control costs, we have to emphasize medical [129] costs management.

There's references in the Excess Liability Handbook that IME doctors that are selected by the company, and there's lists of approved doctors and non-approved doctors that I've seen in cases. Doctors should be cooperative, they have to have prestige and credibility, they have to be a good witness, they have to be a doctor of our choice.

They're picking their IME doctors with litigation in mind, instead of trying to get a fair, independent evaluation. They call them independent so they can say, "Well, they don't work for us, they're independent." But they pay them a lot of money, they retain them lots of times.

And the problem is, they're using them as part of the claims process. See, the carrier has the duty to pay claims in good faith, and they're using an expert during the claims process to not pay what, maybe, they should.

Using an expert after the, like in this trial, a bad faith expert comes in, doesn't have anything to do with the claim. The claims handling, the obligation goes. We're commenting on things we see kind of after the fact. But when you use a biased expert as part of your adjustment of your claim, you're [130] interjecting a predictable expert into the claims handling process.

You have this fiduciary duty of trust. It's not the same as hiring experts, the experts that will come in and testify opposite to what I might say, or me. Because I'm not involved in the claims. I have nothing to say that will affect what they do or don't do. It's a different focus.

Q Mr. Prater, have you also seen similar references in the Claims Superintendent's Manual?

A Yes. I believe it's in several different manuals. The same thing in the Claim Superintendent's Manual as in the excess manual. That you have to use the doctors that are good witnesses that are experts, and they get some really highly qualified, great witness doctors. That's why they win a lot of those bodily injury suits. They can pay for them to hire the best doctors money can buy. And they're great witnesses, and it wins a lot of trials, and it works. And arbitrations.

Q All right, now, what I would like to do is draw your attention now to some specific cases that illustrate how predictable, in addition to the Campbell file that you've referred to.

A Right.

[131] Q How State Farm uses these predictable doctors to try and gain advantage in the claims practices.

A Okay.

Q Do you have any such cases to illustrate it, other than the Campbell file?

A In the Singh file, they hired a Dr. Vasquez.

MR. CRANDALL: I'll object as irrelevant, Your Honor.

THE COURT: Overruled.

THE WITNESS: They used him more than 1,000 times, it came out during the Singh trial. It came out in the trial that Dr. Vasquez had handled 234 claims for State Farm in 1992 alone, and like from '85 to '92 he had been paid to do the IMEs $744,867.

Q (BY MR. HUMPHERYS) You say IMEs, that's the independent medical examination?

A Yeah, but it's really not. That's what they call it, but it's really not.

MR. CRANDALL: I object, Your Honor. The question was does IME mean independent medical examination?

THE COURT: Sustained.

Q (BY MR. HUMPHERYS) All right, now, Mr. Prater, was there other evidence, or testimony in other cases, that relate to this same concept which you [132] are describing?

A Yes.

Q Would you please relate to the jury additional cases and examples.

A There were further witnesses in the Singh trial that were subject to cross examination that testified that, for example, Dr. Lawrence Allen is used a lot in Arizona, he reviewed a file a day for State Farm. Dr. Freeman in Texas, an attorney, Cal Thur, who handled the Zilich case, who hand --

MR. HUMPHERYS: When we went over this yesterday, Your Honor, we were done in an hour and five minutes. We're now over three hours, so you can imagine how slow he's talking today.

THE WITNESS: There's other examples. Cases I've personally been involved in, where they've used a doctor

would include Sanchez versus State Farm, fourteen-year-old passenger in a car got rear ended, clear liability accident. He was a healthy and fine fourteen year old before the accident, afterwards had bulging, herniated disks, problems in his neck.

He went through conservative treatment, he filed his claim against his own insurance company with herniated disks, and his youth, and he demanded $30,000, his UM limits, the highest offer was $15,000.

[133] Q That was by State Farm?

A That's right. They delayed it for a long time, and the highest offer he ever got was fifteen. They hired Dr. Mu, who they claimed was an independent medical examiner, saw IME for about fifteen minutes, he predictably said, "No, I've looked at the CAT scan, there's no herniated disks, no need for further treatment."

State Farm then says, "Hey, your doctor says he's hurt, our independent, very well qualified Stanford doctor says he's not. Let's make a deal."

No offer was made at all in the case until twenty-seven months after the accident. Then when the arbitration finally gets here, they show Dr. Mu an MRI, and Dr. Mu looks at it, he, on the day of arbitration, he says the MRI shows a herniated disk, but then he says, "I don't believe that was caused by the accident. Oh, yes, there is one, but it wasn't caused by the accident. He wanted to say it was kind of old age and degenerative problem in a fourteen-year-old.

MR. CRANDALL: Objection, calling for speculation as to what Mr wanted to do.

THE COURT: Sustained.

Q (BY MR. HUMPHERYS) Restrict your testimony, please, to that which was testified to in that case.

[134] A The arbitrator said it was worth the policy limits. And the bad faith case, it was discovered when we worked on that case, that Dr. Mu was doing IMEs for various

insurance companies for more than 40 years, and testified at least twelve times a year, that he was paid by State Farm, we found this through discovery, 533 times for litigation services between '83 and '92. He worked on at least 397 files. And I looked at other reports that he had done, several of them, it was the same kind of form report, same kind of thing.

Q All right. Now, I think there are -- Do you have other examples of publications of State Farm, or cases that would evidence what you're talking about? And I'm not going to have you go through them, I think you've given enough.

A Yeah.

Q But there are other examples?

A Yes.

Q If you were asked to shift into your high gear in speaking, you could cover it in about ten minutes, could you?

A I think so. And again, it's not just the examples, but it's the training materials and the COR, for example, that we gave to counsel. Did I get that back, by the way? They're still looking. It's not just [135] the case examples. It's also the instructions to go out and do more of it that we see nationwide that's troubling to me.

Q All right. And were there other CORs from other states, such as Hawaii, or other states completely separate and independent of Utah that refer to that?

A Yes.

Q And can you give us a quick example of maybe one or two of those?

A Sure. We see this concept of developing, or getting these IME doctors to help control claims, in CORs and PP&Rs. For example, in a claims operation review in Hawaii in '87, it says, "We should consider the early use of an IME. We need to cultivate more IME physicians."

There's one of the PP&Rs in Utah, a couple of them that I've seen, that one of them in the 6692, one says, as a goal,

to develop one new chiropractic or medical doctor as an independent medical evaluator in 1992, and the goal was completed. Don't know the doctors because their names have been obliterated. In that particular COR, again, it's the same concept. "Go out and get more IME doctors. There's only one in Utah right now, we need more."

Q Rather than read that, I think you've [136] indicated the substance which is contained on that COR.

I'd like to move our attention now to another matter, if we could. And I would like to have you now address, to what extent -- Well, first of all, do you have an opinion whether or not State Farm projects an image which is contrary to its claims practices?

A Absolutely.

Q Would you please describe, first of all -- Well, give us your opinion, and then we'll break it down in pieces and go from there.

A Okay. Well, I think it's no surprise to anyone, we've all seen the advertisements and heard the music, but State Farm basically promises through its advertising campaigns nationwide that, like a good neighbor, they're going to be there for people.

And that implies that, "When the claim comes, we're going to be there, we're on your side, we're your friend, we're trustworthy, pay us your premiums every month, trust us. And when it comes time for us to perform, we're going to be there for you."

And my sense, having reviewed lots of materials, worked on cases, is that while that happens, surely, in some cases, of course, as you would expect, State Farm has a widespread practice of training and supervising and managing its claims personnel to deal in [137] an unfair manner with their insureds, and in certain cases, with third-party claimants.

Q Now, Mr. Prater, before we go into the specifics of your opinion, I would like to ask you, do you believe that all of the employees at State Farm engage in unfair practices?

A I -- No, I definitely don't. And I also believe that there's a lot of employees at State Farm that believe what they're doing is right, but it's really not. That's a common thing that I've seen, and I've seen in this case.

Q We'll talk about that in more detail a little bit later. But would you please now give us some of the underlying foundation for your opinion that State Farm trains, educates, and supervises in a way that has their claims personnel engage in unfair claims practices.

A Sure. Well, again, to get a real good flavor of it, you ought to read those boxes in the back of the room. Because a lot of the manuals that I've reviewed and discussed, and have been discussed in this trial, talk about different techniques that can, some are good and some are bad, and some are good that can be abused.

I know that State Farm sets its goals and objectives from on high. This is something that people learn in the basic claims course when they first work [138] for State Farm, is that the president and the board of directors creates policy, and they control kind of all the subsidiaries, and starts at the top and works its way down.

Q We've already gone through the PP&R program in great detail, so I don't want you to rehash through that again.

A Okay.

Q But if you can just synopsize that very quickly, as a basis to go into your own opinions.

A Sure. The PP&R process, I know it's been talked about a lot, and I have several here I could talk about. But the PP&R process has some goals that are, that I'm very critical of, and that is setting those cost reduction payout goals in advance, before you know what the claims are going to be in the future.

It's an artificial way of trying to control costs, and put pressure on people to pay less than fair value. It's not appropriate, and I think State Farm is now conceding it's not appropriate, because they've changed their PP&R manual and said it's not appropriate to do it.

The problem is, is that they're still doing it. And --

Q Let me stop you there. We have seen some [139] PP&Rs after 1994, when that memo came out, that was shown to the jury. Have you seen examples in your specific cases of either individuals, in the form of testimony or documents, that would indicate that, though the written memo says they shouldn't do, they continue to do it?

A Yes, I have.

Q And would you please relate to the jury what you have seen and witnessed.

A Well, for example, I'll give you the most recent one. In that case in Washington that I was recently asked to consult on, they sent me the deposition of the -- and I've got some of the material on it somewhere, I think -- of the head guy in Washington in charge of their med pay and their PIP claims. He was for a while the head honcho in the state.

And he acknowledged that in, I think it was '93, he got instructions to no longer put cost outcome goals in PP&Rs. And so when he was asked in his deposition about that, he says, "Well, did you stop doing it?"

And he says, "Yeah, but we just do it verbally. We knew that we couldn't put it in writing, we just does it verbally."

Q Did what verbally?

[140] A Told them verbally, on the one-on-one training they do with their people. We can't put them in the PP&Rs, the manual says these aren't appropriate. But we're still going to expect you to keep costs down, keep claims down, and it's just -- He said it was done verbally. He said that didn't made total sense to him, but that was the way it was done. Because State

Farm's very sensitive to what they put in writing, and whenever they put something in writing that gets them into trouble, they get rid of it, change the manual --

MR. CRANDALL: Objection, Your Honor, beyond the scope of the question, rambling.

THE COURT: Sustained.

Q (BY MR. HUMPHERYS) Let me ask you the question. What have you found, as it pertains to State Farm's use of written material, when unfair claims practices have been asserted? Are there changes in their manuals that are made when someone like you points out the unfair claims aspect of it? Or in their internal documents?

A Yeah, they'll try and distance themselves from it in any way they can. That's been my experience.

MR. CRANDALL: Objection, Your Honor, non-responsive.

THE COURT: Sustained.

[141] Q (BY MR. HUMPHERYS) Okay, let me rephrase it this way. What have you found in terms of State Farm's response when experts such as yourself or Mr. Fye -- By the way, do you know Mr. Fye?

A I know of him. I don't believe I've ever talked to him or met him. I could have, but I don't remember him.

Q Are your opinions reached independent of him?

A Yes.

Q Okay. Now, when people such as yourself or Mr. Fye renders opinions, such as it's improper to interject profit in claims department and put these in the PP&R program, what have you found how State Farm responds in their manuals to these criticisms?

A Well, if there's something that's offensive, they think will get them in trouble, my experience has been that they'll obsolete it, they'll call it something else, or come up with a new manual and change the name and change, you know, get the troublesome words out of it. Does that answer your question?

Q Yes. Has it been your experience, however, that the practices change, along with the change of names or the change of manual?

MR. CRANDALL: Objection, vague and ambiguous.

[142] THE COURT: I'll allow it. Overruled.

THE WITNESS: No.

Q (BY MR. HUMPHERYS) Let me rephrase it. Has it been your experience that the improper practices that you have been critical of change, even though the manual may have different wording, or a different name on it?

A Yes.

Q Yes, what?

A It does. The practices continue. And we've seen examples, I see it all the time. You want an example? I mean I can give you --

Q Yes, sure, go ahead. I think you've given some, but give another one.

A An example, just as I was reading, I believe it was Lester Davis' deposition, I don't know if he said it at his --

Q Lester Davis didn't testify here. He testified in a deposition?

A Okay, in deposition. He testified, you know, he didn't see, supposedly, the claims superintendent manual, Article 12, negotiation techniques, horse trading. If an exorbitant demand is made, make a ridiculously low offer. He supposedly didn't see that, and that's been obsoleted, according to State Farm. I read it in the trial testimony that that's somehow [143] obsoleted, and there's another name to the manual, and it's different.

But in his deposition he uses exactly the same word. He talks about horse trading. He talks as he was trained. There's nothing at State Farm that says, "Hey, men and women, loyal people, we trained you wrong. What we said was wrong." There's no retraining, no attempt to make sure they relearn or get reeducated.

If people have been trained improperly, you need to tell them they've been trained improperly, and retrain them, and tell them, "Don't ever use these concepts any more. These are bad." And in the deposition Lester Davis was using almost the same words that came out of this obsolete manual.

Q Even though he had not read it?

A Right. And I think it was Mr. Comella who's over this region as a home office person, in one of the depositions I've read of Mr. Comella, when asked about the Excess Liability Manual, he said that he typically gauged similar kinds of instructions verbally.

State Farm's careful about what they put in writing. They sometimes make mistakes, and things slip down, and that's why we have what we have. But we don't have everything that's out there. They resist giving it to you.

[144] MR. CRANDALL: Objection, beyond the scope of the question.

THE COURT: Sustained.

Q (BY MR. HUMPHERYS) Let me move on to another area, now. We have heard testimony from Ms. Bird, for example, that she thought she had been trained to treat claimants fairly and to be honest, and then she also gave us examples that would call into question that. Did you read her testimony?

A I did, depo and trial testimony.

Q How, as an expert, do you explain that a person like Samantha Bird -- and I don't think anyone doubts her sincerity -- can claim that she was taught to be honest and to treat people fairly, but can then talk about areas where she did not do that? How does that fit into your opinions? How does that happen at State Farm?

MR. CRANDALL: Objection, Your Honor, beyond the scope of this witness' expertise. The question asks for psychological analysis.

MR. HUMPHERYS: No, I'm not asking for any psychological analysis. I'm talking about how, in State Farm's practices, this can occur, that an employee can perceive that they have been trained to be honest, and then give examples of situations where they're not being [145] honest.

MR. CRANDALL: Calls for a psychological analysis of all the employees, Your Honor.

THE COURT: Reframe the question. I'm going to sustain the objection and ask that it be reframed if you're going to try to get an answer to it.

Q (BY MR. HUMPHERYS) Let me ask it this way, then. Did you see examples where Ms. Bird in her testimony indicated that she had not, either treated people fairly, or been honest in her claims practices? Admittedly, that is her own testimony?

A Yeah, she admitted that she did things that were unfair and bad faith, but she also said she was trained, I think, trained to do things properly or in good faith, or something.

Q Let's see if we can explore this a minute. What are the items which she admitted to having been involved in which were either unfair or dishonest?

A Well, she said she was trained to omit things from files, which would, of course, make them deceptive or misleading by omission.

Q Not telling the full story?

A Yes, telling only the half story, or the story that looks good. She was trained not to put things in writing that looked bad, "Don't put it in [146] writing."

She also testified that while the Campbell case was pending, that she had attended that April of 1990 meeting with the other Utah superintendents, where she was told to go back to her office and destroy old manuals and memos and other documents that might be evidence of how they actually really handle claims. So they wouldn't have to be provided in connection with litigation.

There's no evidence that anybody objected to that. She followed the orders, I guess, but she kept the memo because she didn't think it was right, but she did it anyway. She felt that Mr. Stevenson was honest, she didn't like Mr. Noxon, that's very clear, a lot of critical comments about him, and yet Mr. Stevenson, the one she felt was honest, was the same person who carried out the orders not to settle the Campbell case, and that should have been done. So that's inconsistent, in my mind.

She also admitted to acting in bad faith by not settling some claims at fair value. She said she couldn't settle some of them, she'd know they were worth a certain amount, so they couldn't beat Noxon every time, so she admitted paying less than value to people. Predictably, because she wasn't a team player, as I [147] understand it, from the testimony, she was harassed by her supervisor, she was pressured, she said in her depo that she was bullied. She talked about Noxon's being a bully.

When she stood up to do the right thing and was criticized for it, not promoted, she had to leave, she was forced out. Which suggests that, you know, if you try and stand up for what's right or what you feel is right, you're not going to be with State Farm very long, at least in her situation.

In her deposition she said, "We were all well schooled in what not to write down in claims files." And you have to keep in mind that the training that happens at the claims school is just the beginning. That's step A. The training at State Farm is evidence --

MR. CRANDALL: Objection, beyond the scope of the question.

THE COURT: Sustained.

Q (BY MR. HUMPHERYS) Let me ask you, as it relates to the training. Well, let me back up and ask this question. How is -- Now, there may be others, and I don't

mean to interrupt you, but I think the jury's heard Ms. Bird's testimony, and similar things from Mr. Jensen.

[148] How are these comments consistent with your opinion that State Farm trains their employees to be honest and to treat claimants fairly, when you have reached the conclusion that State Farm has a widespread practice of not doing that?

A Because the training, Mr. Humpherys, is continuous. It's on the job. It's supervisor-oriented training. It's a blend of education that happens at the claim schools, and training that happens in the trenches day to day, and the workshops, and the direct supervision by your superintendent is your day-to-day training. They're getting training and feedback and CORs and PP&Rs, it's an ongoing educational training process.

She may have been trained good things at the claim school, but when you get out and go to work, the training continues, and the training that I've seen, a lot of it is not good.

Q Let me draw your attention to Mr. Felix Jensen's testimony about using post-its for some of the information which may not, or should not be contained in the file. Have you seen that as a practice at State Farm with many employees, using post-its that are then removed from the file?

A There's been references to that, yes, by [149] Ms. Noxon, excuse me, Bird, that Noxon used them all the time, by Jensen. I've seen CORs where people are criticized --

Q That's what I want to get to. I want to get to a COR where that was criticized as it pertains to the issue of training, now. In other words, you've talked about how there's training at a school, and then there's the training that goes on day to day.

A That's right.

Q Is the COR part of that training process?

A Yes, it is. It's feedback from the home office on what you're doing well and not doing well.

Q All right.

A What you need to correct.

Q I want to refer, for example, to the claims operation review Mojave North Division in 1991. Is there a reference in here regarding what you've been talking about? Let me draw your attention, here, to page 12 of that.

A Oh, yeah, there it is at the bottom of that one, that's an example. Larry Epstein.

Q Would you read this part, here?

A Sure.

Q Now, just generally, for the sake of foundation, who is Larry Epstein?

[150] A Larry was a new, or new hire, recent hire superintendent, or excuse me, claims person. I could tell you exactly. But he was a new person to State Farm. He's relatively new.

Q All right, and so he may have gone to the first school training, if that were the normal process?

A Right.

Q Now, in these CORs and so forth, is there training that takes place that's given to these various claims representatives, feedback from the upper management about what's going on, and what they're doing right or wrong?

A Yeah.

Q All right, I think we've talked about that. Would you please now read the last paragraph of page 12.

A Yes. Your authority for the most part was in line with realistic evaluation. Larry Epstein did display one file where he went over the granted authority by $750. Also, Larry Epstein has a habit of leaving yellow post-its in the files. These must be removed."

Q Have you seen other circumstances where the State Farm employees use yellow post-its for the purposes of communicating that which they don't want to have in the file?

[151] MR. CRANDALL: Objection, no foundation that this was a communication, that there was anything written on that one. So the question asking about other circumstances assumes facts not in evidence.

MR. HUMPHERYS: Your Honor, I think we have the testimony already in place that these were used for that very purpose.

THE COURT: There's enough foundation from other testimony to allow the question. I'm going to overrule the objection on that basis.

Q (BY MR. HUMPHERYS) Have you seen other situations where employees were taught, or criticized if they did put these yellow post-its in the file, they were taught to keep them out, to remove them, not to have them part of the claim file?

A I've seen testimony on that by other people, yes.

Q Now, is this the day-to-day training, or an example of the day-to-day training that goes on which teaches some of these techniques that you're talking about that are improper?

A That's part of it. It's feedback. It's constant training where there's PP&Rs, CORs, manuals, bulletins, memos. It's constantly educating people on how to handle claims, carry out State Farm's goals.

[152] Q Have you seen, for example, other examples? And I'll draw your attention to Felix Jensen's testimony for a moment.

A Okay.

Q He, I think, talked about how he was trained to always evaluate properly and fairly.

A Right. He was the most senior adjuster in Utah, he said, and been there a long time.

Q And I think, using the preface to one of the auto claim manuals, I'll draw your attention now to the portion which is marked, here, "State Farm's claim philosophy is to pay

what we owe, no more and no less. To accomplish this, each claim, large or small, should be handled only on its own merits, in accordance with the facts of the loss, the law, and applicable coverage, not on the basis of a person's race, age, religion, sex, national origin, or any other irrelevant consideration."

Did you find that Mr. Felix Jensen, for example, used in his practices the very opposite of what is contained here?

A I did. In fact, that's a great statement. That's what you should do. You know? But then when we read, or I read Mr. Jensen's deposition on what he really does, it was totally different.

Q Let's put up page 42 of his deposition. And [153] we'll look at the question on page 42, line 3. "So you would evaluate how the plaintiff would appear if the case were tried?" Why don't you read his answer.

A "Absolutely."

Q Okay.

A "I would look at his age, his sex, his race. I would want to find out about his lifestyle. Is he homosexual? Is he bisexual? Many, many things, in my own mind, to try and evaluate what would be important as far as what a jury would look at a particular person."

Q Go ahead and let's complete the answer.

A "Is this man drunk? When I have had contacts with claimants when they were six, you know, six beers under. Is he an alcoholic? Or how would he come across? I would take that into consideration when I value the claim."

Q All right, now, is this an appropriate way to evaluate claims, based on sex, sexual preference, based on age, based on race, and so forth?

A I think the purpose that's stated in the company manual is the contrary. Race shouldn't be a consideration, sexual preference shouldn't be. It's not related to the claim or what's going on.

It's just, the policy statement in the manual is the proper one. What he's doing as of that time, he [154] offered and said, "This is what I do," and I read it and I about fell over. But he's the senior-most adjuster here in Utah, and that's what he was trained to do.

And Mr. Humpherys, just to be clear, I mean you can evaluate certain characteristics, what kind of witness they'll make, how good the lawyers are in a third-party case. There's certain things you do evaluate. But there are things that you really shouldn't, you know. I mean it's just not relevant.

Q Did you see examples of this, where, other examples of this with people who have testified in this case, where they've indicated they were trained to adjust claims fairly, but gave examples of the opposite?

A I think Mr. Jensen.

Q Mr. Jensen? I think we've talked about him a moment. Let me ask you about the others. How about Marilyn Paulsen?

A Well, Marilyn Paulsen, I believe, testified in this trial that she saw Summers, Mr. Summers falsifying documents in the early seventies, that she told her superintendent about it, who basically told her it's good business, it helped settle claims. So she's getting trained on that point. You know, that's good business to do the phony memos, that's part of the training process.

[155] Q Did Ina DeLong talk about the same thing?

A Ina DeLong said basically that we're programmed at State Farm to believe what we're doing is right, but by doing what is right, by fighting claims to keep innocent people from going out. There was that indoctrination, that mind set, and she said she was trained to believe that what they were doing was right. Somehow it helps the innocent people.

But you've got to be concerned about the claim in front of you. You need to be concerned about the policy holders, too. But it's not your paramount concern, because they don't

have claims right now, most people don't have claims. They just pay premiums, and in their lifetime they might have one major claim. You've got to treat those claims, you've got to treat the checkbook like it's your own.

Q Mr. Prater, we've heard Paul Short testify that he didn't think State Farm did anything wrong in handling the Campbell case. In your opinion, did State Farm violate its own manuals and its own standards regarding fair claims practices in handling the Campbell file?

A No question. Yes.

Q All right. Now, rather than go into a lot of more detail in that regard, have you seen this same [156] process of having State Farm employees sincerely state that they thought they were honest and handled claims fairly, but have seen specific examples where they admittedly did not do so?

A Yes.

Q And have they continued to represent that, even in the light of evidence that they did not comply, that they still represented that they believed they were doing it fairly?

A They may really believe it. And many of them do. There's a lot of good people that believe they're doing the right thing, but they're not.

Q Now, back to a point that we've been talking about at the very beginning, or close to the beginning, regarding the competition.

Remember in the Unfair Claims Practices Act, when we put it up, that is contained in the State Farm manual, I told you we would come back to that. If an insurance company engages in unfair claims practices, the kind that you have been describing applicable to State Farm, what effect does that have on the industry as a whole?

MR. CRANDALL: Objection, no foundation.

THE COURT: Sustained.

Q (BY MR. HUMPHERYS) All right, let me lay [157] some additional foundation. Mr. Prater, in your experience, have you represented a number of insurance companies?

A I've worked for them as a consultant, yes. Not represented them.

Q Excuse me. Did you also, were you also general counsel for insurance companies, or excuse me, for a company, a holding company that had a number of subsidiaries that dealt with insurance business?

A Right. I did.

Q And have you studied, in your education, in your research, regarding the effects of unfair claims practices as it may affect other insurance companies in the industry as a whole?

A Yes.

Q And have you, as part of your teaching process, addressed the issue of what unfair claims practices may do, or have an effect on the industry as a whole?

A I have.

Q And as you serve in your capacity as a consultant -- And if I remember right, I think you said you were serving on a committee for the state of California insurance commission?

A Not me, no.

[158] Q Not you?

A I've been hired as an expert on the claims regs, the Unfair Claims Settlement Practices Act regulations.

Q But by the department of insurance from the state of California.

A Right, yes.

Q All right, I've got that now, thank you. Does part of that consulting, and the issues, as part of that, relate to the setting of rates, and what affects the rates?

A Well, we have regulations that relate to that. That's not specifically addressed the Unfair Claims Practices Act provisions, but I'm familiar with their background and the anti-competitive purpose in connection with my teaching and other things.

Q Now I would like to ask you the question again. If an insurance company engages in unfair claims practices, what effect does that have, if it's a major company like State Farm, the largest in the country, what effect does that have on the industry as a whole?

MR. CRANDALL: Objection, no foundation, and irrelevant.

THE COURT: Overruled.

THE WITNESS: I think what it does, and [159] what's generally understood is that if you have a big company, or any company, especially a big one, that's engaged in unfair claims practices acts, that has an effect on competition, that's why there's an unfair competition prong to the rules. That not only do you do deceptive things, but there are methods of unfair competition.

Because if you engage in these anti-competitive activities and don't pay full fair value, you can go out into the marketplace and sell your insurance for less. You can keep your premiums down and compete against people who pay claims fairly. If you pay less than you owe, then you can lower your rates and kind of go get all the business.

And so it forces other insurance companies to adopt the same kind of practices in order to compete. They also have to start adopting some of these practices in order to compete in the marketplace. Because if you have somebody that's not paying claims, they can sell it a lot cheaper. And we've seen many examples of this in the insurance arena.

* * *

[161] * * *

Q (BY MR. HUMPHERYS) All right, let's move quickly, without talking quickly. All right, Mr. Prater, I'd like to go into a new area, and ask you a general question. Based upon your experience, your training, your education, and your review of all of the material that you've described, do you have an opinion whether or not State Farm attempts to use the legal system to conceal and to refuse to disclose their practices of unfair and dishonest claims handling?

A Yes, I do.

MR. CRANDALL: Objection, Your Honor, irrelevant.

MR. HUMPHERYS: This goes to --

THE COURT: Overruled. State for the record what you think the reason for this relevance.

MR. HUMPHERYS: It relates to the issues of punitive damages and the issues of concealment that are applicable in this case.

Q (BY MR. HUMPHERYS) All right, now, would you [162] please state, Mr. Prater, generally, your opinions, and then we'll explore them in more detail and look at some of the documents supporting them.

A Sure. It's been my experience in the cases that I've worked on, and the documents that I've reviewed, that State Farm uses various techniques, including through the litigation process, whether it's the underlying claim or this kind of claim, to make the litigation process as time consuming, as expensive, and as delayed as possible, so as to gain advantages over plaintiff's attorneys and people that have limited resources.

And there's a number of different things that I've observed that they do to drag things out and to really, in a sense, a bully-like attitude, not only their claims and some of the things we've talked about, but on through the litigation

process, the arbitration process. It's the same kind of a, "We're State Farm, and we can squash you like a bug," I mean, is basically what it's about.

Q Do they engage in the destruction of documents which will harm them?

A Yes, they do.

Q Is that a wide scale basis, or just here in Utah?

[163] A It's a wide scale thing.

Q Now, I would like to, if we could, go through some of the techniques, and use examples, if you will, of what you have seen, how State Farm uses the legal system to conceal and destroy evidence. And if you'd like to refer to a specific case or example, please do.

A Okay. I've prepared some notes on this topic, and I think there's, I don't know if there's an overhead, and I don't think we need to use it, but there's several areas where I see, in my view, techniques used by State Farm and their counsel in this regard.

They make meritless objections, and they claim false privileges. They claim that there's attorney-client work product privileges, that when judges look at it, they determine that's not true, and they order the documents produced. I've seen that, and I think we'll talk about that.

They destroy documents, or claim documents don't exist, or that they've been destroyed, or that they're too expensive to recover, or they can't get information. It's too time consuming to retrieve it, or it's unavailable, or they have lots of different rationale for not producing documents, manuals, things like that, that would tell you about what their [164] practices are or were.

And yet when they get to trial, the judge says, "I think you need to turn them over," and they seek relief from higher courts and take writs and go up higher and they get no relief, they still wouldn't do it. Still, even in light of a judge saying, "We're

going to hold you in contempt," they'll say, "Sorry I'm not going to produce it." And I've seen that in the Singh trial.

MR. CRANDALL: Objection, Your Honor, beyond the scope of the question, irrelevant, prejudicial. Rule 404, 403, and 406. And I'd like to approach the bench.

THE COURT: You may.

(Side bar conference held out of the hearing of the jury.)

THE COURT: Objection overruled. The record will be made after the jury has recessed.

Q (BY MR. HUMPHERYS) All right, Mr. Prater, I was asking you about some of the techniques that you have observed, specifically in the use of the litigation process to conceal State Farm's unfair claims practices and deceptive practices.

You were in the process of describing what you had seen in the Singh trial, and referring it to a [165] specific opinion that you had. Would you please proceed now.

A Yes, I was kind of covering the general area, and then if you want I can give you examples of each.

Q All right, go ahead.

A Another thing that they do, that I've seen in the past, is they designate or produce witnesses that have limited knowledge, and the people that are supposedly the ones that know. And they give testimony of limited value, they really don't know.

They produced witnesses that really aren't the ones that really know, that you're trying to get to the truth, and they produce somebody that is a pitch man, referred to in the Singh trial as shills, people that --

Q What is a shill?

A It's defined as a pitch man, somebody that's kind of supposed to look like they know, but really don't know anything.

Q Like a decoy or something?

A Yeah, exactly.

Q That's a term that, in all my days of school, I've not heard.

A Right.

Q A shill?

[166] A The plaintiff's lawyer in the Singh case referred to the State Farm witnesses as shills, and counsel for State Farm objected, and the judge says, "I agree, they're shills."

MR. CRANDALL: Objection, Your Honor, move to strike.

THE COURT: Sustained, granted.

Q (BY MR. HUMPHERYS) Would you go ahead and specify the specific techniques?

A I've also seen situations where they file extensive motions, with little or no merit. There's other techniques that I've observed, like removing documents when they've been ordered to produce something, they remove parts of it, represent it as being completed, and it's later discovered that it's not, and that's gotten them in some trouble, notably in the Singh case, where these documents came from most of them.

Q Did most of the documents here behind us come from the Singh trial?

A Yes, many of them did. The majority of them did. The ones with the --

Q Bar codes?

A -- bar codes on the bottom all came out of the Singh trial. And it was a long, hard --

[167] MR. CRANDALL: Objection, beyond the scope of the question.

THE COURT: Sustained.

Q (BY MR. HUMPHERYS) Let me have you go to each of the specific techniques, and I'd like you to give more information about why you have reached each conclusion. And I think your first conclusion was that there were meritless objections, and claiming false privileges in order to avoid production.

A Right. Repeated examples in the Singh trial, I read the trial transcript, I observed part of the trial.

Q Were you actually there at some of the trial?

A Towards the end of it I was, yes.

Q How long did that trial last before it settled?

MR. CRANDALL: Objection, no foundation.

THE COURT: Lay the foundation.

Q (BY MR. HUMPHERYS) I thought I did. Were you there during some of the trial?

A I was there towards the end of it, yes, for a couple of days.

Q And you've read the transcript?

A I have.

Q And did the transcript pages have dates on [168] them?

A Yes, they do.

Q Okay, how long did the trial last?

A I could look at the exact dates, I have that in my file, but it was ongoing for a few months, as I recall. A couple of months.

Q Did it settle before the verdict was rendered by a jury?

A It did.

Q All right. Now, during the course of that trial, was State Farm ordered to produce certain documents?

A They were. Many documents. Subpoenas were served on State Farm, they were ordered to produce documents.

Q All right, now, if you would please explain in what way the Singh trial illustrates your opinion that they use meritless objections and claim false privileges in order to protect, producing documents and other information.

A There are many examples in the Singh trial where State Farm, through its lawyers, were arguing that things were attorney-client privilege, or trade secrets, or proprietary, and when the judge took those and looked at those documents, once they were produced for his [169] review, he said, "No, they're not."

He ordered them turned over, and there was ongoing battles, because they would turn over parts of it, and the plaintiff's lawyer would say, "I only got parts of it."

And they'd say, "No, you've got it all. The rest of it's attorney-client privilege."

And the judge basically found that there wasn't privilege attached.

MR. CRANDALL: Objection, Your Honor, hearsay. He's asking for his opinions based on the evidence. The hearsay evidence is not itself admissible.

MR. HUMPHERYS: Your Honor, as it pertains to a court proceeding which has been reported, that is not hearsay, but an actual court proceeding. And he may refer to that. Just as deposition testimony has been.

MR. CRANDALL: I'll object as best evidence, Your Honor. The record itself is the best evidence.

MR. HUMPHERYS: But an expert may use in summary form large quantities of evidence. Your Honor, the Singh transcript is, what, forty volumes long or so.

MR. CRANDALL: Your Honor, an expert can use hearsay to form his opinions, but that doesn't make the hearsay admissible.

[170] THE COURT: I'll allow him to testify as to his opinions, but not to attempt to put in hearsay through it.

Q (BY MR. HUMPHERYS) Then, avoiding the purpose, or excuse me, avoiding what was said by any particular person in the Singh trial, can you now continue with your example of what happened, and how that supports your opinion.

A Well, again, when documents were ordered produced, there were several examples where they weren't produced, and the judge -- And there were writs taken to higher courts to get protection, they were denied, and the judge said, "Produce them, produce them now."

And in one instance State Farm's lawyers took the documents and locked them in the van and refused to produce them. Just willfully refused to produce them.

Q Eventually were extensive documents produced pursuant to the Singh trial and the court orders?

A I'm sorry, what?

Q Eventually were extensive documents produced pursuant to the court orders?

A Many were, and many weren't. Many were withheld, and the judge had ordered more to be produced, and that's what prompted settlement.

Q As we've been looking at some of the CORs [171] today, the PP&Rs, some of the older manuals, some of the other information, did those documents come from the Singh trial?

A Most of them did, yes.

Q Have you seen, in any other case in your experience and your memory, where more documents were ordered and actually produced by State Farm than any other case?

A No.

Q Have the documents that were produced in the Singh trial, did they, do they describe and depict that which you have described as your opinions, or upon which your opinions are based?

A They form a portion of the basis for my opinions, yes, the documents that I have received and reviewed.

Q Now, were there still pending orders to produce documents when the case was settled?

A I believe there were, yes.

Q Are we talking about having the trial almost complete, or in midstream? Where were we in that regard?

A We were still --

MR. CRANDALL: Objection, no foundation.

MR. HUMPHERYS: Your Honor, he's testified he [172] read the transcript, and was there part of the time. I don't know what more we could talk about.

MR. CRANDALL: He doesn't know the process of defense counsel, as to how long that was going to last.

THE COURT: Sustained.

Q (BY MR. HUMPHERYS) Okay, let me ask you this. Had the plaintiff even finished their case?

A No.

Q And there was still left State Farm's defense in the case?

A Correct.

Q All right.

MR. HUMPHERYS: Now, Your Honor, I'd like to approach the bench, because I'm going to ask him about the amount that the case settled for.

THE COURT: All right, you may.

(Side bar conference held out of the hearing of the jury.)

Q (BY MR. HUMPHERYS) Mr. Prater, we're going to have a hearing on that question, and we'll come back to it another time.

All right, now, have you seen this technique that you've been describing that was applicable in the Singh case, that is the technique of using privileges and objections in order to avoid producing information [173] and documents, have you seen that done in other cases?

A Yes, I have.

Q And is that widespread, as far as you can determine?

A From what I've seen, yes.

Q Let's go to the second item that you have raised, that is destroying documents, or claiming they don't exist.

A Okay.

Q Have you seen that in other cases?

A Yes, I have.

Q Could you give a[illegible] example.

A Sure. There's examples in the Singh trial, again, where there were repeated orders to turn things over, representations that, "We don't have them," or, "We can't produce them."

And then when they were ordered to do it, in some cases they did it quickly, it didn't take thousands of hours, it didn't cost lots of money, it happened quickly.

I know that in the Trujillo case, I've read that, it was, in fact, I think, discussed in the Singh trial, State Farm used to claim that the Excess Liability Manual didn't exist, or that they didn't maintain it. But the evidence showed that it does [174] exist, and it was in their brief bags, and it was available for review as an educational tool by State Farm people.

I even noticed Aaberg, whose name was on the book, he was confronted with the book in the past in depositions, and he denied knowing anything about it. His name's right in front of it. He didn't know where it came from.

State Farm also claimed in the Singh trial that the brief bank didn't exist, and that the general claims law manual didn't exist, and these were determined to be false, based on my recollection of the testimony.

Q And were eventually documents produced that disproved their position?

A I don't know if they produced them in Singh or not, but we've seen things that have come out in other cases. I don't know if those specific documents came out in Singh or not. I just don't recall without looking at the transcript.

Q Have they been produced in other cases?

A Yeah, there have been a number of things that State Farm has denied exist, or refused to produce, or that they're trade secrets, and they come out in other cases and they're determined to be public domain [175] documents.

Q To your knowledge, has State Farm denied that they have any list or compilation of bad faith cases against it, or punitive damage cases against it?

A State Farm has consistently maintained, in several cases, including this one, including Smith and others, that they don't maintain any lists, or any computer data, or any information in any form, at the present time or in the past, on claims made against State Farm, or payment made by State Farm for bad faith, for unfair trade practices, excess verdicts, or punitive damage awards.

Q All right, now, Mr. Prater, based on your knowledge of the various regulations pertaining to the rating, or the establishing of premiums, what is your understanding generally, can punitive damages be used to compute premiums?

MR. CRANDALL: Objection, calls for a legal opinion.

THE COURT: Is that --

MR. HUMPHERYS: Let me rephrase.

Q (BY MR. HUMPHERYS) Have you, in your experience in the insurance industry, are you aware of whether or not punitive damages can be used to compute premiums?

[176] A Yes, I have a general understanding of it.

Q And can they?

A No. You can't use punitive damage verdicts to get a rate increase to pass on the punitive damage verdicts to other insureds.

Q Through the premium?

A That's right.

Q Let me see if I understand this right. Your understanding is that punitive damages cannot be used to increase premiums?

A That's right.

Q If that is the case, can a company properly address that issue of computing premiums, without keeping track of the punitive damages awarded against it?

A Not in my opinion.

MR. CRANDALL: Objection, no foundation.

MR. HUMPHERYS: This is purely a hypothetical, Your Honor.

MR. CRANDALL: No foundation that he has the actuarial knowledge to compute that.

THE COURT: Lay the foundation on that.

Q (BY MR. HUMPHERYS) All right, Mr. Prater, let's just talk about premiums for a minute. Are you generally aware of how premiums are determined?

[177] A In a general sense. Not in an actuarial detailed sense, but in a general sense.

Q Are you generally aware of the kinds of elements that go into fixing a premium?

A Sure.

Q And those items which are not to be used in fixing a premium?

A Generally I have an understanding of it, yes.

Q And based upon your knowledge, experience, and training, can a company properly know how to set premiums without keeping track of the punitive damages against it?

MR. CRANDALL: Objection, no foundation.

THE COURT: Lay the foundation.

MR. HUMPHERYS: Okay, I'll lay some more.

Q (BY MR. HUMPHERYS) You previously testified that punitive damages can't be used to compute premiums.

A That's my understanding. And again, I've looked at regulations in various states that address that point.

Q Are you aware of State Farm, for example, actually keeping track of punitive damages that are paid, based on accounting forms?

A Yes. They claim they don't do it, but there's evidence to suggest otherwise.

[178] Q Have you actually seen forms, where the forms are used for the purpose of filling them out and turning them in when punitive damages are assessed?

A Yes, I have.

Q Are you generally aware that a 1099, a tax form, needs to be sent out to those who receive the punitive damage award?

A I don't know about, in that detail, whether they send a 1099. I know that there was testimony in this case recently by one of State Farm's experts that they keep track of that internally for IRS purposes, but that's 1099s or something, I don't know.

Q All right. Now, in determining premiums, does a company typically look at its profit made at the end of any given year or time period? Or the lack of profit, I should say?

A Do they look at their profit?

Q Yes. In other words, typically speaking, when you're going to raise a rate, do you look at how much you've made or lost in any given time period?

A That may be one of the considerations. Again, that's not something I deal with on a frequent basis. I know the general concepts, you know, you price the product so that you have enough to pay claims and pay your bills and have some, a profit, if you can do [179] that. There's no guarantee in this business, you're not entitled to a profit. I mean it's a risky business, but there's factors that go into it, and it's probably better than an actuary or somebody adds those specific --

Q -- the specifics of it?

A Yeah.

Q Punitive damages are taken from the profit of the company; is that correct?

A That's right. The punitive damages, for example, in Florida the regulations in the boxes say that when you submit your rate request to the Florida department for rates, that you cannot include in that any amounts you've paid for, I think, punitive damages and excess verdicts, so you have to keep track of it if you're going to honestly get your rates.

It doesn't make sense that you wouldn't keep track of it. It doesn't make sense to me that State Farm doesn't keep track of these things. It takes more faith than I have to believe that.

Q All right, now, any other cases which illustrate how State Farm has claimed that they don't have the information, or that documents have been destroyed, or somehow the information is not available?

A Well, it's important, too, with regards to [180] the punitive damage concept, to note that there have been State Farm people that contradict State Farm's official position. They say that, "We can retrieve information on excess verdicts or punitive damages." I've seen depos of high-level people that say, "We can retrieve it."

I've seen forms, I've seen directives from the president's office saying that if there's a punitive damage claim, it's reported to the general claims at home office, and it's reported to, the responsibility for all lawsuits against the company rests in corporate legal.

I was general counsel in a company, and we didn't have much litigation, but any that there was I knew about, and I know that State Farm in their corporate counsel's office, in their claims office, the home office, they have this stuff. But they say that they don't. And they don't want to release it, and I suspect it's because they think it'll hurt them.

MR. CRANDALL: Objection, Your Honor, for suspicions.

Q (BY MR. HUMPHERYS) We won't talk about your suspicions.

A Okay.

Q Though we all have them at one point or [181] another.

MR. CRANDALL: I'll also object to editorial comments by counsel.

MR. HUMPHERYS: What I mean is, generally speaking, we all have suspicions. I assume you are one. I didn't mean any harm by that, counsel.

Q (BY MR. HUMPHERYS) Any other examples, other cases that can illustrate that?

A An example, like in the Smith case this happens to interrogatories, which are answers under oath, you have to answer those under oath. State Farm asserted that it couldn't produce old manuals, it couldn't produce old memos, it couldn't produce old operations guides, it could only produce current ones. And this is a consistent theme that you see that they don't have anything that's old, they just have new stuff.

And yet when Macherle was presented with a copy of the Excess Liability Manual, and asked to look at it and authenticate it, and he looked at it, and he says, "Oh, yeah," he knew he had seen that, but then he was able to produce two memos that obsoleted it. This is a company that says, "We can't produce things," but when it helps them, they can.

MR. CRANDALL: Objection, non-responsive, [182] beyond the scope of the question.

MR. HUMPHERYS: It's directly in the scope. I was asking him to give illustrations of the opinion he was giving.

THE COURT: Overruled.

Q (BY MR. HUMPHERYS) All right, let's move on, now, to the document retention program, which the jury will hear more about, I think, in the future.

A Okay.

Q This is a new program, I understand, that's been instigated within the last two or three years; is that your understanding?

A Yes, the official program, as I understand it, this particular -- They've had previous destruction programs, but this particular one, called the Records Management Program, was officially established, as I understand it, in June of 1993. Coincidentally, the same time as the Singh trial, June of '93.

Q As part of that, is there a video entitled "Buried Alive"?

A There is.

Q And we'll get a chance to maybe look at that at another time. But I want to draw your attention to a portion of that document retention program. Do you recognize this sheet?

[183] A I do.

Q It's entitled "Buried Alive," Records Management Video Leader's Guide?

A Yes.

Q All right. Now, just briefly describe to the jury what the video is about.

A The video, which I understand was prepared by a company outside of State Farm, although it's used as a training tool at State Farm, and has an introduction by a high-level State Farm attorney in it, it's used as an educational tool to show what happens when employees don't destroy documents, that these documents often have to be produced when requested in a court.

And it has a fictional company that has some records management program, and some people take things home,

and they're not destroying things like they've been instructed to, and those documents come back to haunt the company in the video.

Q All right. And who is it that's supposed to review the video?

A Everybody. All the employees, I think.

Q Here, under, "Who should view the video? Our goal is for every State Farm employee to view the video."

A That's right.

[184] Q To your knowledge, is that something that has happened?

A Yeah, I think somebody testified, who created the program, State Farm, in a deposition, that almost all of the employees have now seen it.

Q Are State Farm employees now required to sign certifications that they have destroyed the documents, pursuant to their records retention program?

A Yes, I've seen certificates of destruction that the various managers at the offices have to sign, certifying to the president of State Farm that they have, in fact, destroyed the documents in accordance with their record management program.

Q Now, we've previously seen this, but I want to focus on it at this juncture. In the steering committee notes, the steering committee of the records management committee, would you just read this last paragraph, here.

A "It was mentioned at the RVP conference," which I assume is regional vice president conference, "that at any one time there are approximately 130,000 suits throughout the company. Because of this activity, we need to take advantage of any records destruction windows that are available."

Q Has it been your experience, Mr. Prater, that [185] State Farm does destroy documents which depict its claims practices that are deceptive and unfair?

A And any claims practices, yes. They try and destroy old stuff so that they can control what gets out in litigation and what people see.

Q I want to show you now a letter which has been referred to but not seen by the jury, and this will be contained in Exhibit 61, Your Honor, when we offer it. I don't think there will be an objection, I think that these documents have all been stipulated to.

This is a letter with State Farm Insurance Companies as a letterhead, it's from corporate headquarters, the address of Bloomington, Illinois. That's where their corporate headquarters are, correct?

A Correct.

Q This is addressed to a particular law firm in Irvine, California. Can you give us the background of what you know about this letter?

A Well, I can recall generally the testimony of, I believe it was Mr. Cochran that wrote the letter. This letter was sent out to State Farm's defense counsel nationwide, asking them to return documents to State Farm that they may have in their possession, and to search through their old files and their closed files, and to either send it in or to destroy it. I think -- [186] I can't read it from here.

Q I know this is hard to read, so let me read it, if I could, into the record, because it is of very poor quality. "Reference State Farm's record retention policy. To whom it may concern.

"State Farm insurance companies are in the process of adopting a uniform company-wide record retention policy. In that process, we have considered all of our records, some of which are in your possession.

"At the inception of and throughout any claims litigation involving State Farm, certain documents may be provided to your law firm by State Farm, such as the original claim file, manuals, reports, and correspondence. With regard to such documents, State Farm's retention policy is as follows:

"One. The original claim file should be returned to State Farm when your file is closed, and,

"Two. Any other State Farm materials should be destroyed by your law firm when the file is closed, parentheses, after the time for appeal has passed." End of parentheses.

Has it been your experience, Mr. Prater, that that is an appropriate instruction by an insurance company when there are outstanding discovery requests [187] for the production of --

MR. CRANDALL: Objection.

Q (BY MR. HUMPHERYS) For the production of various documents, including manuals?

MR. CRANDALL: Objection, assumes facts not in evidence, irrelevant.

THE COURT: Overruled.

THE WITNESS: No, it would not be proper in cases where there's ongoing litigation to destroy documents that might shed some light on why things were done and what the procedures were, et cetera.

Q (BY MR. HUMPHERYS) Have there been a number of bad faith claims against State Farm that are continuous -- Let me put it this way. In the past few years, have there always been, to your knowledge, pending bad faith claims against State Farm?

A Yes.

Q And in those bad faith claims have the practices of State Farm in unfair and deceptive claims procedures been at issue?

A Typically they are, yes.

Q And are the manuals, memos, and other documents pertaining to their actions inside the company, evidence of their claims practices?

A They certainly can be, sure.

[188] Q And are they typically requested in these cases?

A Yes, they are.

Q Now I'd like to draw your attention to the fact that State Farm has stated in opening statements, and in some of the cross examinations, that they maintain what is called a BI lawsuit report, I believe, which has been represented to be a count of the number of BI lawsuits against State Farm insureds, and their win-loss record regarding the trials of those cases.

I would like to ask you, first of all, based on your experience, your training, and your education, whether the figures contained on these reports are trustworthy?

MR. CRANDALL: Objection, no foundation.

MR. HUMPHERYS: Let me back up and lay a little foundation.

Q (BY MR. HUMPHERYS) Have you seen the BI lawsuit reports which State Farm has produced?

A I have.

Q And have you read testimony regarding how that has been compiled by State Farm?

A Yes, I have.

Q And have you also, likewise, been involved as a consultant and as an expert in evaluating their BI [189] lawsuit reports?

A Yes, I've been provided with them specifically in this case.

Q And have you also heard State Farm's position from various witnesses regarding how they use it?

A Calculate wins, yes, I have.

Q Have you also seen the internal memos pertaining to the BI lawsuit reports?

A I've seen some of them, yes. I don't know if I've seen them all, but then I never know. Actually I've seen some.

Q Okay. Now, I would like to ask you, as an expert, based upon your training, your education, your experience, can the figures contained in the BI lawsuit reports be trusted?

MR. CRANDALL: Objection, no foundation.

THE COURT: Overruled.

THE WITNESS: In my opinion they cannot be.

Q (BY MR. HUMPHERYS) Why?

A Because you can't objectively verify the basis for the numbers. They won't produce the files, they won't produce information so that you can cross compare it. It's a self-reporting, internally, in a company that has pressure on people to win lawsuits. And so, you know, I just don't know that it can be, you [190] know, trusted.

Q To your knowledge, has there been any case where State Farm has produced the underlying files that support their BI lawsuit reports?

A I've not seen them.

Q Have you heard of them doing that?

A No, they strenuously resist doing that, producing other files in discovery.

Q Now, has it been your experience, in looking at the BI lawsuit reports, that there is a column on them for internal purposes, that are not included on the BI lawsuit reports produced in this case?

A Based on my review of documents contained in the bodily injury claims superintendent's school, yes, there is. And a very important column, I might add.

Q What is the column that is not in place in the documents which State Farm has produced in this case?

A Well, I looked at the documents produced, I looked at the reports, and all of the columns. When I looked at the bodily injury superintendent's manual, I saw a memo from Mr. Macherle, in charge of the claims department, general claims memo 238, dated December 1st, 1988, and in that particular memo, he says that, in connection with the bodily injury liability suit report, [191] that there is an additional column that they added to their report, which is months in litigation, the months in litigation column. It's been added in the disposition section, he says.

You're supposed to enter in this column the number of months the suit or the arbitration was in litigation, beginning with the month in which the suit was referred to defense counsel for handling. If this suit is transferred to a second defense firm, enter the names of both firms, and the number of months each handled by the defense through trial, arbitration, or settlement. And then it says, "Excess suits filed against the company should not be included in the report."

So when I looked, to me that's a big issue. You know, they say they win the cases, but how long? Were they paid fair? How long was it drug out? The months in litigation column is very important, because when State Farm's general practice is to delay, drag things out, hold on to their money until the last possible moment, which is not good faith. But that is not in the reports.

Q Mr. Prater, has it been your experience that protracted litigation wears out claimants to the point of having them more willing to settle on a compromise [192] basis?

MR. CRANDALL: Objection, no foundation.

THE COURT: Overruled.

THE WITNESS: No question about it. People don't want to go to court to collect benefits --

MR. CRANDALL: Objection, speculation.

MR. HUMPHERYS: This is based upon his experience.

THE COURT: I'll allow it. Overruled.

THE WITNESS: It's definitely the case, and I think everybody can relate to that. I mean court is not a place that you want to be if you're trying to collect benefits you're entitled to, that you're owed, or to fight out a lawsuit to collect money in a bodily injury case, it's not a fun place to be.

Q (BY MR. HUMPHERYS) Is it surprising to you, Mr. Prater, that State Farm claims to win such a high percentage of cases that do go into litigation, based on their definition of win?

A Based on their statistics, assuming they're true.

Q Yes?

A It doesn't surprise me, because State Farm has superior resources to win litigation. A lot of the cases, if you look at the reports, the average amount [193] that they pay is $13,000 on one of the reports, the first one I looked at, for example.

Q That's the average amount they paid on lawsuits, is $13,000?

A Yeah, indemnity, $13,000, which suggests to me that most of the claims, on the average, are small cases. They're the whiplash, soft tissue cases, which are hard to win for plaintiff's lawyers for a number of reasons. Number one, juries are very skeptical of them, and rightfully so. I mean there's a lot of them that are not good cases. Second, plaintiff's lawyers don't have the resources or the money to fight them.

MR. CRANDALL: Objection, Your Honor, no foundation. Speculation.

MR. HUMPHERYS: Let me just lay a little bit more foundation.

Q (BY MR. HUMPHERYS) Mr. Prater, have you been involved in a number of litigation cases that involve personal injury claims?

A As an expert on insurance after the fact, yes.

Q And as part of your general counsel work at Allied, did you also have some involvement in such claims, at least from the standpoint of studying and evaluating and reviewing?

[194] A Not really at Allied. We didn't deal with the third-party stuff at Allied, but in connection with my teaching and my work, I've been exposed to this. And reading the training manuals, et cetera.

Q And as a consultant and an expert, have you been involved and have seen what's involved in cases that require the plaintiff proving their claim, and what it takes by the way of experts, and evidence and exhibits and the cost and so forth?

MR. CRANDALL: Objection, no foundation.

MR. HUMPHERYS: I'm asking for it.

MR. CRANDALL: No, he's admitted it's after the fact, not the underlying cases, he's never handled an underlying case.

MR. HUMPHERYS: That was with Allied. Now I'm asking him as a consultant and as an expert, if he's had such experience.

THE COURT: You can answer the question.

THE WITNESS: Yes, I have, and I've studied State Farm's approach to these cases, I know how they approach these kinds of cases.

Q (BY MR. HUMPHERYS) And does State Farm, in their publications, set forth the types of cost advantage that they may have over plaintiff's counsel? Or, I should say, the resources advantage?

[195] A I think it's fairly obvious. You know, plaintiffs have contingency fee lawyers, State Farm has lawyers they

pay by the hour. They have, they hired fancy IME doctors, plaintiffs can't hire them on the small cases. Juries are suspect. State Farm has internally a practice --

MR. CRANDALL: Objection, I'll move to strike as non-responsive, and the court have the reporter read this witness the question so he can answer the question.

THE COURT: Restate your question.

MR. HUMPHERYS: Sure.

Q (BY MR. HUMPHERYS) In the course of your involvement in these cases, have you had the occasions to review State Farm's internal documents where they discuss the economic advantage that State Farm has over plaintiffs?

A I've seen comments in that regard.

Q And you were describing some of what you read. Would you please finish now?

A I think, again, it's clear when you look at all these various documents that come out of State Farm, that the adjusters have the pressure to fight the buildup cases, which they define as buildup, which are the low impact accidents, soft tissue injuries. There's increased pressure on the adjusters to fight those. And [196] some of them should be fought, I'm not saying you shouldn't fight them. You should fight phony accidents, things like that.

State Farm has a jaundiced eye view of that, in my opinion, based on what I've seen. They think there's lots of them, lots more than there really are, but they fight the buildup, they recruit the IME doctors.

MR. CRANDALL: Objection, Your Honor, I believe the question asked him to talk about documents he saw.

Q (BY MR. HUMPHERYS) Were what you are describing what you obtained from reviewing the documents of State Farm?

A Yes.

Q Including the testimony of State Farm employees?

A Correct.

Q Okay, would you continue please?

A The BI Proficiency Program, that's the program, getting the photos, they win a lot of these cases. Most insurance companies, in my experience, win these cases. So these cases, the statistics don't show how long the delay, they don't show if it was a fair thing, if it was just an overpower, David versus Goliath [197] scenario, you know, where State Farm just overpowered the other side. They don't show how many people were just forced to give up because of the pressure.

Q Do the BI lawsuit reports show whether or not the offer made just before trial was made before the lawsuit was even filed?

A I don't think it shows that, no. Not that -- If I understand your question correctly, there's a lot that it doesn't show and doesn't include. The first-party cases are not in these reports.

Q Out of the cases that do go to trial, Mr. Prater, can you tell me what you can conclude from the statistics that State Farm does provide regarding these BI lawsuits?

MR. CRANDALL: Objection, no foundation for statistical analysis.

MR. HUMPHERYS: Your Honor, they've produced the statistical analysis. If we can't rely upon it -- Will you stipulate we can't rely upon your own statistics?

MR. CRANDALL: I'll stipulate he's not qualified to analyze statistics. That's my stipulation.

THE COURT: Lay the foundation he has some background to conduct the analysis you're asking him to conduct.

[198] Q (BY MR. HUMPHERYS) Have you had a chance to review the figures that State Farm has produced regarding the wins and the losses?

A Yes, I have. And the charts that they prepared for illustrations.

Q Have you reviewed the memorandum where they analyze what the charts and the reports mean?

A I believe I have, yes.

Q Have you read testimony regarding how State Farm interprets and views the statistical data on the BI lawsuit reports?

A Yes. How they calculate wins, I think if I've not mistaken, there was even testimony in the trial here on that.

Q Right. Okay, now, out of the cases that go to trial, based upon the information you have, your experience, your education and training, can you tell us what the statistics show as it relates to offering less or more than fair value?

A Right. Well, I mean I'm not analyzing the statistics, I'm just reading the numbers they're putting forth to the jury. They have a chart which says that, out of the cases that go to trial, the State Farm statistics show that in 12.7 percent of the cases, I believe it's nationwide, their offer that they made was [199] less than the fair value of the case as determined by the jury. That's from their own records, they're admitting that in 12.7 percent of the cases the amount they offered was not the value as determined by the jury.

Q Now, these statistics don't even show the excess cases, do they?

A That's my understanding they don't.

Q All right. Let's now go back to another point of your opinion, a technique of using or producing witnesses with limited knowledge or information to give sworn testimony on any given subject. Would you please explain to the jury your experience in this regard. Have you actually witnessed that, and have they actually done it?

A I have seen it, I think we talked about the shill issue, the witnesses being produced in the Singh trial that were really decoys. They weren't the most knowledgeable.

I've seen cases, in this case, I believe Tracy Moredock was produced as the most knowledgeable person in this case on the Excess Liability Handbook, and when her depo was taken, she'd just seen it the day before her deposition. She wasn't going to be able to be in the best position to talk about it if she'd just [200] seen it two days day before.

I noted that Mr. Mendoza was documented, or designated as the most knowledgeable person in this case on the custodial affairs of records, but then in his depo he said he didn't keep them. It wasn't part of his job.

Q Have you seen anything in the training regarding this issue of having witnesses -- Well, let me back up. Does State Farm train their claims personnel regarding how to present witnesses during trial?

A I have seen information in that regard. Specifically, I recently saw and viewed, or actually I didn't view, I read the transcript of a training seminar that was conducted at State Farm's corporate headquarters for all of the nation's divisional claims superintendents, it was a seminar in 1986, I believe. I saw a number of things in that training seminar for the divisional claims superintendents that were troubling.

Q Okay. What I would like to do, if we could, please, is show a particular video that lasts about two minutes, regarding this claims process. This is Manuel Mendoza. This is the same Mr. Mendoza that you've referred to that gave a deposition in our case?

A Yes.

[201] MR. BELNAP: Counsel, can I ask you a question?

MR. HUMPHERYS: Sure. We sent you a letter that spelled that out. Do you not have that? So we won't have to take the time now. 378, Mr. Mendoza, auto claims, page 51 of the transcript, it's trial page 358.

MR. CHRISTENSEN: 378.

MR. HUMPHERYS: 378, excuse me.

(WHEREUPON the videotape was played, a transcription of which follows.)

"The next portion of our program, as has already been described to you, and as you have in your brochures, has to do with witness preparation.

"Now, before we let our speaker begin, let's consider that each of you, as you sit here today, has the potential for being a company witness. Not only you, but consider the employees that work for you, your claim handlers, your claim management group, they all can become part of what you will have information about today, and things that will be helpful to you.

"Now, you may be saying to yourself that, 'My state doesn't have that big of problems. None of that bad faith litigation.' You might say, 'My section, it's all quiet.'

"Well, that may be true today. But will it [202] be true tomorrow? Next week? Next month? Or when you just get back to your desk you might find that your world has exploded.

"So it's important to keep in mind that, even though you may not have bad faith litigation, you do have those matters that deal with deciding coverage issues. And certainly the company witness is going to be one of the prime witnesses, one of the chief deciding factors in how that decision will go.

"So let's consider carefully what our speaker will say, and let's use that information to evaluate our witnesses, early and carefully. And let's not find ourselves having to put money on files because of a witness that was ill-prepared.

"You say, 'Oh, that doesn't really happen.' Well, sometimes the witness can be well prepared and still be a poor witness. As a matter of fact, I just attended a meeting

this week in which we put some money on a file that we might not otherwise have done, were it not for a company witness.

"So it's very important to remember and keep in mind that what we want to hear is a well-prepared witness. And we know that out there we have many good employees that will make very good witnesses. But we have many, many more that can become more than just [203] adequate witnesses through proper preparation.

"So let's give Mr. Kornblum a good hand, and welcome him again for this section of the program. And keep in mind that he will have a session following his presentation to handle questions. And so here we go, Mr. Kornblum."

Q (BY MR. HUMPHERYS) Mr. Prater, that was an introduction to Mr. Kornblum's portion of this training session. I would like to ask you if, in this training session, there were things that troubled you, and you said there were things that troubled you.

Can you explain to the jury what in this session by Mr. Kornblum troubled you, and I would like to put up some of the items on the overhead.

A Okay. There were comments made with regards to the witness preparation in the cases that, for example, there's a comment that --

MR. BELNAP: Your Honor, can the record reflect our objection on this, that we've taken up with the court?

THE COURT: It may. You may have a standing objection based on what you've already made a record on.

Q (BY MR. HUMPHERYS) Go ahead, Mr. Prater.

A One of the comments is telling the divisional claim superintendent managers that your dollars are well [204] spent in discovery, resisting any effort to get other claims files, because believe me, they'll find something that will hurt.

Q Let me put that up on the board, if I could, up on the screen.

MR. BELNAP: What trial page are you on?

MR. HUMPHERYS: Trial page 363.

Q (BY MR. HUMPHERYS) Would you just read, starting here where it says, "This is one place."

A Talking about discovery, "This is one place where your dollars are well spent in discovery, to resist any effort to get other claim files, because believe me, they'll find something that will hurt."

Q Is it appropriate to suggest that claim files should not be produced because they will find something that will hurt?

A Well, there may be legitimate reasons not to produce claims files, but that suggests that it's because there's evidence of something there that will hurt. So resist, resist, which is what they do. They resist.

Q To your knowledge, in this case, has any claim file been produced, other than the Campbell file?

A Not to my knowledge.

Q Other things that trouble you, Mr. Prater.

[205] A "We keep plaintiffs tied up in law and motion for months. Now, it's the old mad dog defense tactic, but it works."

Q Let me put that up on the board. Starting here, trial page 369, "And we keep plaintiffs tied up in law and motion for months. Now, it's the old mad dog defense tactic, but it works."

A Yes.

Q Why's that troubling to you, Mr. Prater?

A Because you can't fight State Farm, I mean, very easily. It's a difficult thing to survive the long ordeal that you take on when you try and fight a company the size of State Farm.

I mean part of that's to be expected, but if you've done it and been around it enough, and you see the kinds of things that are done, it's very troubling. The resisting, the withholding, and not producing total things and that kind of stuff. And Mr. Kornblum was the Singh lawyer.

Q Mr. Kornblum was the attorney for State Farm in the Singh case?

A Yes, he was. The initial lawyer that handled the case.

Q Other things that trouble you?

A And they referred to him as their top gun, he [206] was State Farm's top gun. Another thing, witness preparation. When Mr. Kornblum was joined by Dr. Martin Peterson, a jury consultant, a psychologist, that Mr. Kornblum uses to help him get witnesses ready to testify in trials, such as this, bad faith cases, and there were some comments there that I found troubling, because I hope that the truth is coming out as much as possible in the trial, and the training of the DCSs, in terms of how to prepare witnesses might, suggests to me otherwise.

Q Let me have you turn now to trial page 383, in this claim conference.

A Marketing job?

Q Yes, let's read, if we could, starting with, "You've got to give defense lawyer the encouragement and the wherewithal, the budget to put the money where it's effective. And that is the time that's spent with the people who are going to tell the company story, because trying one of these cases, and I don't want this to be misunderstood, is basically a marketing job."

A And this is about that, big cases like this one.

Q "We've got to sell a jury on our concept of doing business and the way we provide service, and that peace of mind and security to our policy holders."

[207] Now, tell me why this is troubling to you, Mr. Prater.

A Because the focus shouldn't be on trying to sell the jury. The focus should be on justifying what you did or didn't do, and a sound basis for that. I don't have a problem with putting things in the best possible light, but I have a problem with, and we'll see later things in the tape where they're training them to influence people's memories and things like that.

That's what I have a problem with, because I think juries have the right to look at files that are complete to know what really happened, and to hear from witnesses that will tell the truth, and aren't coached and trained to talk about what they did by professionals in an improper way.

Q Turning your attention to trial page 395, "Lawyer versus lawyer. The two lawyers arguing their respective positions, and if equally competent, justice will result. In principle it's a good system. In actuality, truth is illusory. Truth is a perception. What the jury perceives in that courtroom is what the jury is going to believe is the truth. Whether, in fact, it actually is or not, is another question."

Now, what is troubling about this to you, Mr. Prater?

[208] A It just suggests to me that we want to do everything you can to just manipulate the truth to create a perception of truth. And it's suggested in the tape that that's done by really working with the witnesses, the company witnesses, spending a lot of time with them, adjusting their attitude and, you know, helping them to remember things, or things that create memories in some places. The flavor of the whole thing is one that is more geared towards winning cases than it is towards telling the facts so the jury can decide the truth.

Q Let me draw your attention now to page 407, trial page 407. "Procedure, half day for attitude adjustment, half

day to organize file, one-fourth of the file per day per witness."

On line 12 it says, "We require a half a day for attitude adjustment, talking about the philosophy of handling claims, talking about the philosophy towards this claim file. Generally we need a half a day to organize the file. It's funny. We get sent the original files, and they are represented to be in order."

Now, without necessarily going into the following pages, tell us what is troubling about spending a half a day, or excuse me, a quarter of a file [209] per day per witness. And attitude adjustment.

A Well, even on, I believe the page before that it talks about the fact that some witnesses that are going to testify in bad faith trials need attitude adjustment. Exactly what they mean by that, they don't say.

But it says they have a simple procedure to prepare witnesses for bad faith trials, but it requires a substantial amount of time. Do the attitude adjustment for the first half day, then you take a half day to organize the file, then you're able to work through with the witness a quarter of the file per day per witness.

And I think it's a quarter of an inch of the file per day per witness. And there's another portion where he spent a half day helping a witness understand one document.

Q I can't, obviously, show the entire conference.

A No.

Q Let me draw your attention now to trial page 451, down at the bottom, where it begins, here, "Then we've got to deal with it, build on this framework, and then that's how we then create a memory for the person, or help them see their memory to --

[210] A Help them use their memory.

Q Did I say use?

A Yeah, it's okay.

Q Help them use. "That's how we then create a memory for the person, or help them use their memory to put these facts together."

All right, now, you were saying that some of these things are troubling, not on their face, but collectively. Could you explain now why this becomes troubling?

A Because it's about preparing witnesses and telling the divisional claims superintendents to go back and get everything to train them, to get them involved with Guy. I mean they have other witness consultants. Dr. Peterson was working on cases at the time, but there was a guy, George Vivamore --

MR. CRANDALL: Objection, Your Honor, beyond the scope of the question.

Q (BY MR. HUMPHERYS) Let me ask this question. During the conference, does George Vivamore, V-I-V-A-M-O-R-E, speak up and relate a specific example of what was happening to him as it relates to this counsel that we've just read?

A Yes.

Q And what did he report in this training [211] session?

A He offered to the people there that, "You know, we have quite a few lawsuits for failure to pay claims." He said he wasn't prepared for a depo in a case, and after six hours in a deposition he knew he was in trouble. And he went to see Guy Kornblum, and he got Guy to represent State Farm in a lot of the cases, including Singh. And he went into the next session of his deposition confident.

And he said in the seminar, "Every question I was asked we rehearsed numerous times, and I think the plaintiff's attorney was totally frustrated."

You know, it's okay to prepare witnesses, and because people aren't familiar with the process here, and you tell them what to expect and that kind of stuff, I don't have a problem with that. But helping them to create memories, or truth is an illusion, we're going to sell it, those are concepts that don't, to me, seem proper for insurance companies that are defending their conduct on the merits before a jury.

Q Let me draw your attention to Jim Maack. Who is he, first of all?

A Jim Maack, according to the tape, he spoke, was the controller and the assistant treasurer for State Farm, and he has been with State Farm since 1952 as of [212] the time of this tape. I don't know where he is today.

Q Was he part of the training seminar in this '86 conference?

A He was.

Q And did he say, or suggest some things in training that you found troubling?

A Yeah, he did. He talked about punitive damages, and the fact that punitive damages faced the company on a regular basis, people trying to get into our pocket, we don't want to furnish financial information, and we're not going to do it unless we're ordered to do it, and we're going to only furnish the annual statements, the public ones. We're not going to furnish our secret ones, our internal ones, our internal data, or our internal statements.

It talks about that at trials we're going to try and convince people that we really don't have a bad time, even $10 billion in surplus. We're going to try to convince people that we really don't have $10 billion in surplus.

He says it's a little difficult to do when it's right there in front of everybody's eyes, but we try and make it sound like less by saying, "Well, it's only $230 per policy holder." Same

kind of thing I saw come out here. It's just a game to try and disguise the [213] truth, and these people are being trained in this.

Q Mr. Prater, did you see other techniques in using the litigation process to either conceal, or to fail to disclose, or in some way take advantage from the claim standpoint?

A Multiple examples in Singh. I talked about some of them.

MR. CRANDALL: Objection, I don't believe the scope of the question, he's talking about the claims process. Singh was an extra contractual lawsuit.

MR. HUMPHERYS: It's still part of the same process, Your Honor. It goes to the issue of punitive damages, and the widespread practices in all different kinds of claims, and that they're the same regardless of whether it's first party or third party.

THE COURT: Overruled.

THE WITNESS: In -- You know -- They got into trouble in Singh with the judge, basically.

MR. CRANDALL: Objection, Your Honor.

THE WITNESS: I'm trying to simplify it and shorten it.

MR. CRANDALL: I move to strike.

THE COURT: I'll sustain the objection.

MR. HUMPHERYS: I appreciate you have rather strong feelings about the case, but let me just have you [214] relate some of the other techniques that you observed that you considered to be improper use of the litigation process in their concealing of information.

Q (BY MR. HUMPHERYS) Well, Mr. Kodani, who was bar coding the documents and keeping track of them, the lawyer who was paid like a million and a quarter dollars to do that in that one trial, he was obliterating things, blacking out things, redacting things that he wasn't supposed to, and it was improper.

When State Farm was ordered to produce by the judge judgments for bad faith against State Farm, they only produced about twelve. Even Mr. Kodani himself was familiar with other ones that weren't produced. Lots of witnesses talked about other ones that weren't produced, they just, they wouldn't produce it at all if they could get away with it. And if they had to produce it, they'd produce part of it. Then when they'd get caught, the lawyer would say, "Well, were you instructed by State Farm to take things out?" And he'd say, "No, I wasn't." And Kornblum said, "No, I didn't give Kodani instructions." And then --

MR. CRANDALL: Objection, this is violating the court's previous ruling on hearsay.

THE COURT: Sustained.

THE WITNESS: Several.

[215] Q (BY MR. HUMPHERYS) Let's talk about the techniques, and not about the specifics of what was going on. You've related some of this relating to the Singh case. Let me have you draw your attention to a talk given by Leo Jordan. Who is Leo Jordan, first of all?

A At the time he was associate general counsel for the auto company, as I recall.

Q And to whom was he giving his talk?

A I don't remember exactly who it was addressed to.

Q Was it a formal gathering?

A That's my recollection.

Q And what was troubling about the talk that he gave?

MR. CRANDALL: Objection, no foundation, and hearsay.

MR. HUMPHERYS: Your Honor, perhaps counsel is unaware this talk is already into evidence as an exhibit.

MR. CRANDALL: The form of that question, Your Honor, clearly calls for hearsay.

MR. HUMPHERYS: It's already into evidence.

THE COURT: The question was, "What is troubling?"

[216] Q (BY MR. HUMPHERYS) What did you find troubling about Mr. Leo Jordan's talk?

THE COURT: Overruled, you can ask that question.

THE WITNESS: He simply suggested in the talk that the way to avoid people getting damaging documents is to make sure that they are non-existent ab initio, from the inception.

Q (BY MR. HUMPHERYS) "Ab initio" means what?

A From the inception. That they never existed.

Q Are there many examples that we could go through, Mr. Prater, memos, documents, manuals, that type of thing, that would demonstrate what you are presently opining on, or giving opinions on?

A I believe so, yes.

Q All right, in the interest of time, let's forego that.

Now, I would like to change the subject for a brief moment, and then we'll conclude my area of questioning. I would like you to, first of all, look at some testimony by Frank Haines, approximately two or three months ago that was given in this case, page 86. Now, Frank Haines, he is presently the claims vice president for the State Farm companies?

A I know he replaced, I believe Macherle, so I [217] believe he is, yes.

Q And prior to that he was the claims vice president for the auto company?

A That's my general recollection.

Q All right.

A I don't know all the names, but that name definitely stands out.

Q Was he one of the highest claims persons in State Farm presently, then, at that position?

A Yes, he is.

Q All right. Let me read to you, and then I want to ask you a question. "In your experience in the claims department of State Farm, have you had the occasion to interface with claimant lawyers, lawyers who are representing claimants?" Would you read his answer please?

A "Yes, I have."

Q "And has it been your general experience, while working in claims, that claimants who retain attorneys typically retain them on a contingency fee basis?"

A "That's been my understanding."

Q "Has it been your understanding -- What's been your understanding as to the percent of the contingency fees, if you have any? Not any specific or [218] isolated ones, but generally, what contingency fees can run?"

A "My general understanding would be somewhere between a third, up to 50 percent."

Q Now, Mr. Prater, has it been your experience that claimants who bring actions against State Farm typically use contingency fees?

A Yes.

Q Is that well known in the insurance industry?

A Yes, it is.

Q Is it foreseeable for a company to know that a claimant who would bring an action against State Farm would have an attorney's fee arrangement of, based on a contingency fee, together with reimbursement of their costs and expenses?

A Yes, it is.

MR. HUMPHERYS: Your Honor, this might be a good opportunity to stand up and stretch. The last area that we're going to go into with him has been the area that was subject to the motion yesterday, and Mr. Christensen, because he was handling that area, would be the one asking the questions.

THE COURT: This deals with the regulators?

MR. HUMPHERYS: The regulators and commissioners, and it's restricted to that.

[219] THE COURT: Let's take a stretch break. Why don't we take our seats, and Mr. Christensen will begin.

MR. CHRISTENSEN: Could I explain briefly to the jury, Your Honor, why we are doing this at this stage?

THE COURT: Well, why don't you begin with the questions, and I'll see if we need an explanation.

MR. CHRISTENSEN: All right.

DIRECT EXAMINATION BY MR. CHRISTENSEN:

Q Mr. Prater, are you aware that State Farm, in disclosing its defense in this case, as part of the discovery process, has designated several insurance regulators that State Farm plans to call as witnesses?

A Yes, I am.

Q And I'm going to write these here on the board. Former regulators or insurance commissioners. Do we have Mr. Yancey from Utah?

A Yes.

Q And do you know what his position was?

A He was appointed, according to my notes, by the governor as insurance commissioner from '85 to '93.

Q Okay. And do we have a former insurance commissioner from Nebraska?

A I believe we do, yes. Mr. McCartney.

[220] Q And we also have a former insurance regulator from Texas.

A That's right. He wasn't a commissioner, he was on the board, a three-person board. Reynolds, yeah.

Q And then, as a current regulator, do we have someone from Illinois?

A Yes.

Q Do you know his name?

A I believe it's Richard Rogers.

Q Is that where State Farm has its headquarters?
A That's right, its state of domicile, Illinois.
Q And we have a Mr. Ovard from Utah?
A Yes.
Q Now, are Mr. Rogers and Mr. Ovard commissioners, or are they employees within the insurance departments of their states?
A They're employees.
Q Do you have an understanding as to how State Farm was able to arrange for these witnesses to participate in this case?
A Yes, I do. Based on the testimony of the witnesses themselves.
Q And what is that?
[221] A Essentially they were contacted by Mr. Yancey, who was an expert for State Farm in the bad faith trial, and they were called by Mr. Yancey shortly before their depositions were taken, and asked if they wanted to get involved and basically come say some good things about State Farm. Not in those words.
Q Okay. These people are friends of Mr. Yancey?
A Yes, that's my understanding, they all said that they knew him and worked with him.
Q Was Mr. Yancey a friend of thirty years of Mr. Hanni?
A That's my understanding, yes. And I recall Mr. Hanni asking Mr. Yancey to call some of the commissioners to see if they wanted to be involved.
Q Okay. Now, these witnesses have testified, and I'm not going to try to cover everything that they may have said in their depositions, but speaking generally, these witnesses have testified in their depositions that they've not observed a pattern and practice at State Farm of unfair claims handling.
A That's right.

Q Have we asked you to assist us in responding to that testimony?
A You have.
[222] Q Let me see if I can lay some foundation. First of all, would you explain what a department of insurance is?
A It's basically a regulatory agency, and its job, the department's job is to do a number of things, to regulate the business of insurance, essentially, within the state's borders. That means a thousand plus insurance companies doing business there, agents, brokers, deal with premium issues and rate issues, and a whole host of things. There's a lot of responsibility the insurance departments have. Unfortunately they don't have, in my opinion, the manpower or the money to --
MR. CRANDALL: Objection, no foundation, Your Honor.
THE WITNESS: -- to carry it out.
Q (BY MR. CHRISTENSEN) That leads to my next question. Based on your experience and knowledge of the departments of insurance, do they have adequate resources to cover all the bases that they're supposed to cover?
MR. CRANDALL: Objection, compound and no foundation.
THE COURT: Lay the foundation.
Q (BY MR. CHRISTENSEN) Mr. Prater, you've [223] taught insurance law, now, for how many years?
A Well, let's see, I think I just completed my thirteenth year. Fourteenth, maybe.
Q And you've had the other background with insurance that's been discussed several times in this case. Have you had some direct involvement with insurance commissions?
A I have. And I've read the depos of these particular people on that subject.
Q And have they been asked if they have adequate resources in their depositions?
A Yes, they were.

Q Have you been asked to provide counsel or consulting to the insurance commission in California?

A The recent case that I mentioned, yes, and I talk to the department in California from time to time, and other departments, as well.

Q Have you done some research at our request, looking into the insurance departments, in an effort to formulate opinions as to the adequacy of their resources to police unfair claims practices?

A I have looked into what they've done in that regard, yes.

Q Do you have an opinion as to whether the departments of insurance in general have adequate [224] resources and staff to effectively police the insurance carriers, when it comes to unfair claims handling?

MR. CRANDALL: Object to the form of the question in general. No foundation that it's the same in every state.

THE COURT: Overruled, and I'll allow you to pursue it as to state, and allow cross examination on the same issue.

THE WITNESS: I do have an opinion in that regard, yes.

Q (BY MR. CHRISTENSEN) And what is your opinion?

A That commissioners don't have the ability to police adequately and enforce the unfair claims settlement practices, regs. They have the responsibility to do it, they're supposed to do it, and many of them may try to do it, but they just don't have the person power, they don't have the resources, and a lot of the things that go on, go on in secret.

And so I know of no commissioner anywhere in any of these states or other places that has the inclination to try and manage the companies and/or stay up on the day-to-day. It's kind of like saying, "The attorney general knows everything about neighborhood crime." It just isn't going to happen. It's a [225] regulatory agency, they've got their hands full, they're understaffed, they keep track of some stuff, they know some stuff.

But as evidenced in the depositions, they don't know much, in my view, or they don't have a reasonable basis to conclude that State Farm is a white hat company, and doing nothing to anybody, because they admit in their depositions that they hadn't seen any of the documents, any of the manuals, any of the PP&Rs. They weren't aware of any case, anywhere, where State Farm ever did anything to anyone that was bad, except for a couple of exceptions, and that's generalized. But we can go through the individual testimony if you'd like.

Q And we'll do that to some degree. What, largely, do insurance departments focus on?

A Solvency.

Q Explain that, please.

A Financial solvency, that's a big, important issue. You know there's a lot of fly-by-night health insurance trusts and companies, underfunded companies, that market and sell insurance, but there's no security, there's no money to back it up. So they're constantly dealing with ERISA, trusts, uninsured trusts, underfunded carriers that don't have sufficient capitol [226] to meet their obligations. Solvency is a major focus for insurance companies. For insurance departments, I'm sorry.

Q And that doesn't deal with claim handling?

A No. I mean there may be bad claim handling there, too, but their primary focus, first of all, is on their own domestic companies that are domiciled in their state, and they do their best to give some supervision or regulation of other carriers, by requiring them to have licenses, or have their agents appointed, or have rules about what agents can do with premiums and trust accounts and that kind of stuff.

They do a lot of that, and they're very active in terms of regulating agents that sell insurance in your state. But they can't do much with out-of-state companies, they don't have the resources, the manpower, or the inclination to try and do that.

Q All right, let me use as a specific example, apparently it came out in great detail back in the early 1980s, and now pointing at Mr. Summers' very lengthy deposition, that he was indicating that State Farm engaged in ongoing unfair practices, and the jury heard him describe those.

As far as you're aware, did the department of insurance in Utah ever do anything to determine whether [227] there was any validity to what Mr. Summers was saying?

A Not to my knowledge. I don't know one way or another.

Q Does that surprise you, or is that typical?

A It doesn't surprise me. Again, for the reasons stated.

Q Mr. Summers and State Farm apparently both agreed, as part of his case, that there had been documents falsified in 150 different State Farm files. As far as you're aware, was there any investigation done, either of State Farm or Mr. Summers, as a result of those facts coming to light?

A No. Not that I'm aware of. And I haven't seen anything produced in the data that I researched, either, that would suggest that was the case.

Q State Farm, as you mentioned earlier, was found guilty of bad faith last November in this case. As far as you're aware, has the Utah department of insurance done anything to look into that?

A Not to my knowledge.

Q Now, in a given state, will there be more than 1,000, maybe more than two or 3,000 insurance companies doing business in that state?

A That's not unusual. In fact, the commissioners testified on that subject, or the [228] regulators did.

Q Is there any way it's feasible for the insurance companies to know what's going on in individual claims with all those companies?

A You made the same mistake I did. Insurance commissioners?

Q Did I say that?

A You said companies, but that's okay, I understood. No, it's not feasible, it's not practical to expect them to be able to do it with their staffing and funding concerns. That's why we have jury trials to hear the facts and the evidence and make decisions.

MR. CRANDALL: Objection, Your Honor.

THE COURT: Sustained.

Q (BY MR. CHRISTENSEN) Now, you've testified at some length about State Farm's practice of keeping certain things out of files, and putting certain self-serving things in files. Do you have an opinion as to whether that practice is, in part, motivated by State Farm's desire to keep insurance commissions from learning certain things?

A Well that's the nature of secrecy, you keep it secret. They're not disclosing it to the public, they're resisting it in trials, and they're not going to give it to the insurance commissioner, either. I mean [229] that just a lot of things that are bad go on in secret, and you try and cover that up, and so I have no reason to believe that they're turning over the information to the insurance regulators. The regulators are supposed to be like the police department, in a sense, in the industry, but again, not very effective in the claims handling area, in my opinion.

Q All right, let me touch on another area. Do the insurance commission jobs tend to be political?

A Typically.

MR. CRANDALL: Objection, no foundation.

Q (BY MR. CHRISTENSEN) How are --

THE COURT: Just a minute, sustained. Lay some foundation of his basis for understanding whether they're political.

Q (BY MR. CHRISTENSEN) How are insurance commissioners, how do insurance commissioners typically get their jobs?

A They're typically appointed by the governor, some are elected. In California now we have an elected commissioner, we have had for a couple of years. But my last check it's generally they're appointed by the governor.

Q For example, do you recall Mr. Rogers who served, I think for three years, and Mr. Reynolds in [230] Texas?

A Right.

Q Served on the Texas insurance board. Do you recall what he said about how he got his job?

MR. CRANDALL: Objection, hearsay.

MR. CHRISTENSEN: It's in his deposition.

MR. CRANDALL: Same objection, it's still hearsay.

MR. CHRISTENSEN: No, it's not.

Q (BY MR. CHRISTENSEN) What was his testimony about how he got his job?

MR. CRANDALL: Objection, calls for hearsay.

THE COURT: Sustained, it's hearsay.

MR. CHRISTENSEN: From the deposition?

THE COURT: It still would be.

Q (BY MR. CHRISTENSEN) Do you have an understanding, without quoting the words, as to how Mr. Reynolds got his job in Texas as a member of the insurance board?

A My understanding is he was appointed by the governor. That's my recollection.

Q Do you have an understanding as to whether that came as a result of political connections?

A I could look at my notes in more detail, because there's just notes that I prepared to aid me in [231] the trial. Would you like me to look?

Q We can move on.

A I know that he wasn't in the industry before he got the job.

Q Do you know what he was doing, do you have an understanding as to what he was doing before he became a member of the Texas insurance board?

A I recall him saying something about he was selling tractors. He hadn't been in the insurance industry before.

Q Okay. And so these jobs to -- Let me back up to move on to another area. Typically these jobs are either political elections or political appointments?

A That's the only way I know of to get the job. Appointed, or run for election if it's one of the few states that has an elected commissioner.

Q Are you aware, based on your background and the things you've studied and know, whether insurance companies are active politically?

A Sure. They are.

Q And is State Farm, in particular, active politically?

A They're one of the most active.

Q Do you have information as to who the biggest spender was in California in 1994 for political [232] lobbying?

A I've seen indications of that, yes, of State Farm.

Q That was State Farm?

A Yeah.

Q Does there tend to be a somewhat less-than-detached relationship between the insurance companies and the insurance regulators?

A It's hard to describe it. If you go to an NAIC meeting, or National Association of Insurance Commissioners meeting, you get a flavor for it.

Technically the commissioners are the police agency, but there's a lot of politicizing and schmoozing, obviously, that goes on between the commissioner's office and the various insurance companies. I'm not saying it's all inappropriate, but there's a close relationship that exists.

Q And you've mentioned NAIC. What is that?

A National Association of Insurance Commissioners.

Q Do each of the commissioners in the various states belong to that?

A They attend various meetings, and my understanding is that they belong to it. I've been to a couple of meetings, one that I can recall, and I had a [233] sense of it, and I have a good friend that's an ex-commissioner.

Q Do they attend these meetings every three months?

A That's my recollection. It's been a while since I've been to one, but they have quarterly meetings or annual meetings.

Q And the commissioners and people on the commission staffs go to those meetings?

A And many others.

Q Representatives of the different insurance companies?

A Yes.

Q Did you say you've been to those meetings before?

A I've been to one that I can remember. I've been to other insurance conventions and meetings of various sorts with commissioners, but I can recall one of the NAIC meetings that I went to in Phoenix a number of years back.

Q Describe what that was like.

A It was like, you know, typical convention. You have the regulators from the different states, and some open meetings on different topics, and closed meetings, mostly socializing. There's some closed-door [234] meetings that only commissioners partake in.

But in the evenings it's mostly the insurance companies have their hospitality suites and lots of food and drinking, and whatever. And the commissioners come, and everybody knows everybody.

The ex-commissioners all come, you can tell who they are because they wear a little ax on their lapel to show they

belong to the passe club, where they were wearing these little axes on their lapel. The chief deputies wore a half ax, which they jokingly called the half-axed club.

They all get together. They schmooze and have fun. And there's business, they talk about national problems in general ways and in specific ways. They have closed-door meetings that only they can attend to, so I don't know what goes on in those meetings.

Q Let me ask you this. Do the insurance companies take the commissioners golfing and entertain them, things like that?

A I haven't ever gone on those, but I've heard about the trips. That's all I can tell you. You know, I'm sure that that goes on.

Q Who picks up the tab --

MR. CRANDALL: Objection, no foundation, move to strike.

[235] THE COURT: Sustained, granted.

Q (BY MR. CHRISTENSEN) Okay. Who picks up the tab for all these, this socializing and these meetings?

A I assume that the people that sponsor them. I don't know for sure, because I don't pay the bills. The companies sponsor a lot of them. Insurance companies.

Q Now, in recent years have the insurance regulators started to keep records of complaints that they've either received, or in some cases determined to be valid, that have been filed by people who are complaining about the way they were treated?

A Yeah, that's common for insurance departments to keep some kind of complaint statistics that people submit a written complaint, particularly on a form that usually the department provides, if you ask for it. They generally keep records of those written complaints.

Q Now, do you understand, from reviewing these regulators' testimonies, that one of the things, and maybe one of the main things they rely on in stating they've not observed a pattern and practice at State Farm of unfair claims handling, is based on the complaints and the numbers of complaints received?

A I recall one or more of them talking about that, that State Farm had low complaint ratios in their [236] state, and that was part of the basis for their opinion that State Farm was a good company.

Q Have you obtained from the department of Illinois some documents relating to complaint ratios?

A Yes, I have. Different documents, and including their newsletters and other documents. Public documents.

Q What is this page that I'm about to show you?

A It appears to be a copy of a page from the Illinois insurance newsletter that they publish for the public.

Q And is this something made available to the public?

A Yes, it is, and I ordered copies back several years and received them, provided them to you per your request.

Q Okay.

A This is the official regulatory newsletter of the Illinois department of insurance, it states so right on its face.

MR. CHRISTENSEN: Is there an objection to my putting this in?

MR. BELNAP: No. Do you have a copy for us?

Q (BY MR. CHRISTENSEN) Do you see the parts that I have underlined on that transparency?

[237] A Yes, I do.

Q Would you read the underlined parts, please.

A "Director of insurance Mark Buzall," it looks like Buzall, "has released the 1994 consumer complaint ratios for the Illinois insurance companies and health maintenance organizations, but warned consumers to view them cautiously."

Q Would you read the bold print now?

A Sure. "Complaint ratios were never intended as a marketing tool for insurance companies or producers."

Q And then would you go down and pick up down here.

A "'Further, the complaint ratios may be just as useful for what they don't show,' he said. 'Complaint ratios were never intended as a marketing tool for insurance companies or producers. Unfortunately they are sometimes used that way.'"

Q Do you agree with the statement, based on what you know, that the complaint ratios may be as significant for what they don't show as to what they do?

MR. CRANDALL: Objection, no foundation regarding any studies of complaint ratios.

THE COURT: Lay the foundation.

Q (BY MR. CHRISTENSEN) Have you made some [238] analysis of what the complaint ratios don't reflect?

A Yes.

Q As well as what they do?

A I did.

Q And would you explain what you've determined in that regard, please.

A Well, in Illinois, for example, they only keep track of companies in their complaint ratio statistics that have ten or more complaints. So the companies that have fewer than ten, including maybe big companies, are not even listed or rated in the complaint ratios at all.

And plus there were a few years where they were doing complaints based on per million of premium. Another year they were doing complaint ratios based on per thousand policies, and then they did the per thousand policies for a few years, and then they came out and said, "That's not reliable, we're going to do it another way."

And I mean it's some information, but it certainly is not, in my mind, iron-clad evidence of anything. So you know,

it's -- You give it the value it's worth. And it's not supposed to be used to market, and they know that themselves. That's not what this is for, to try and convince anyone that these mean you're a [239] good company because you have a low complaint ratio, because most people don't complain.

MR. CRANDALL: Objection, misstates the evidence.

THE COURT: Overruled.

Q (BY MR. CHRISTENSEN) I'm going to show you another document. It is also from the Illinois insurance department?

A Yes, it is, it appears to be. Again, without seeing the copy that it came from, it's hard to tell, but it certainly appears to be, because it looks like something I've seen before and provided.

Q Okay.

MR. CHRISTENSEN: May I put this on the screen?

Q (BY MR. CHRISTENSEN) Is this from a different time frame, but also the Illinois insurance department?

A I'm looking for the Illinois reference, there. Springfield, Illinois, Chicago. It certainly appears to be. I'll accept it.

Q Let me read the underlined part. "Washburn cautions -- " Was he the insurance commissioner before the man whose name we had trouble reading?

A I don't know. I don't know if he was before [240] or not.

Q "Washburn cautions against placing too much credence in complaint ratios as an isolated measure of company performance. Ratios are useful regulatory tools to the extent that they alert us to potential problems that may trigger a market conduct examination or closer surveillance of a particular line. But it is unwise for a regulator or consumer to evaluate a company solely on the basis of its complaint ratio."

And then I'll skip down a few lines, "Complaints are defined as written correspondence, primarily expressing a grievance against an insurance company."

A That's right.

Q Have you reviewed the testimony of Mr. Bruce Davis that's been given in this trial?

A Yes.

Q Where he described a number of unfair methods that he personally used?

A I have.

Q Are you aware of what he testified to in this trial as far as whether there had ever been a complaint by anyone who he'd taken advantage of?

A I recall generally that he said that he didn't know of any complaints with the department of [241] insurance. That's my best recollection without looking at the testimony, the trial notes.

Q Let's assume, hypothetically, that someone has not been treated fairly on an insurance claim. What factors may keep that person from complaining to the insurance department?

MR. CRANDALL: I'll object as calling for speculation.

THE COURT: Reframe the question.

Q (BY MR. CHRISTENSEN) Have you considered what factors may keep someone from complaining? In other words, why people who were treated unfairly may not complain to the insurance department?

MR. CRANDALL: Objection, no foundation, calling for speculation as to reasons why people do things.

THE COURT: Sustained.

Q (BY MR. CHRISTENSEN) Let me ask it this way. How well known is it, from what you're aware, that the insurance department is available to receive complaints, within the public?

A Better known now than it was in past years, but still not generally known. There are, like in California, are now requirements that when a claim is denied, they put in the notice, you know, you have the [242] right to go to the commissioner. It's a relatively new development. It's helped somewhat getting some more complaints to the commissioner, but it's still only --

The written complaints are just that, written complaints. And in my experience, most people do not complain to the commissioner and ask for help, because the commissioner really can't help them in any meaningful way anyway. They don't help them historically. We know that.

Q Are many people who have been treated unfairly unaware that they've been victimized?

A That's also a possibility. That's right. They may think they've received full fair value, and not even know it to be able to make that. That's certainly a possibility.

Q Is it generally known that insurance commissions don't tend to do much, even if you do complain?

MR. CRANDALL: Object to the form of the question, calling for speculation as to what's generally known.

THE COURT: Sustained.

Q (BY MR. CHRISTENSEN) Mr. Prater, are you aware of whether, for example, attorneys who become aware of abuses, tend to report those abuses to the [243] insurance department? Or do you know?

A Yeah, I know, and most don't. It's very rare.

Q And why's that?

A My --

MR. CRANDALL: Objection, no foundation, calling for reasons and speculation as to why lawyers do things.

THE COURT: Sustained.

Q (BY MR. CHRISTENSEN) All right, let me move to a new area. Although the insurance commissions have some responsibility with respect to regulating insurance claims abuses, have you done some research to determine whether they, in fact, tend to do so?

A I have.

Q And what have you learned in that regard?

A I'd like to explain, if I can, by starting about what I know in California, and then expand it out to the other states.

Q All right, would you do that, please.

A Sure. In California, I think by way of back drop, to help you understand, the Unfair Claims Practices Act that sets forth those deceptive practices, in most states it's the insurance commissioner's responsibility to police and enforce violations of that [244] act. Because you don't have the right, as a consumer, to sue directly for a violation of those.

There may be evidence of bad things, but you don't have a right, generally, to sue directly and in court like this, sue an insurance company that say, "You violated these statutory provisions designed to protect me."

And the reason is because the commissioners have basically taken the responsibility on themselves, and they've said, "We'll regulate this, we'll control this, and we'll protect the consumers."

The problem is, because of the lack of manpower, because of the lack of incentive and resources, they don't do it. And it's best illustrated in a case in California, which is, of course, a big insurance state, and State Farm does more business in my state than anywhere else, in any other state --

Q In fact, let me stop you right there. Do you know whether State Farm does more business in California than several states combined?

A Well, according to the membership fees collected in their annual statements, they do more business in California

than all the states of the commissioners that are testifying, combined. But I think it's important, because in California we used to [245] let people sue directly third-party claimants and insureds, carriers, for violating these rules.

But it was overturned, the right to do that was overturned in 1988 in a case call Moradi-Shalal. And the Supreme Court at that time overturned the previous Supreme Court decision that said you could do it, and said, "Wait a minute, the commissioners should be doing this."

The dissenting justices, there were two, made it very clear. And what the dissenting justices did is, they researched back in California history to 1959 from the time that that Unfair Claims Practices Act was enacted, to see if there had ever been a single case where an insurance commissioner had ever done anything in a court of law to stop a commissioner from ever violating the rules, and basically came to the conclusion, in the dissenting opinion, that there was not a single reported case in twenty-nine years, from where the California insurance commissioner has taken any action against an insurer for unfair or deceptive practices involving a claimant.

Q All right, and I want to put a one-page from that dissenting opinion on the screen.

THE COURT: Mr. Christensen, before we do that, I think I detect a little weariness generally, so [246] why don't we take a little stretch break for this last call to get ourselves back.

Be seated.

Q (BY MR. CHRISTENSEN) I'm going to put on the screen -- Let me see if I can improve our picture, there. From the -- This is a part of a California Supreme Court decision?

A That's right, it's the dissenting opinion.

Q All right. And I don't really want to get into the legal issues, here.

A That's fine.

Q But the statements of two justices from the California Supreme Court, would you read those, please, where I've underlined.

A "Curiously, the majority find it necessary to caution the insurance industry not to commit the unfair practices proscribed by the insurance code, and they politely invite the insurance commissioner to continue to enforce the laws. However, the majority fail to demonstrate that such enforcement has never existed."

Q Has ever existed?

A Has, it says "ever." Since, I think so. My eyes are going.

Q Let met read --

A "Since 1959, when sections 790," which is our [247] Unfair Claims Practices Act in California, that's the code section, "and the following of the insurance code were adopted, sixty-two volumes of the California Reports and 297 volumes of California Appellate Reports have been published. In those 359 volumes there are more than 300,000 pages. On not one page of one volume is a single case reported in which the insurance commissioner has taken disciplinary action against a carrier for unfair and deceptive acts or practices in the business of insurance involving a claimant. Not one case in twenty-nine years.

"In the absence of demonstrable enforcement by the insurance commissioner, it is understandable that claimants seek to litigate their own rights, rather than to rely on big brother."

Q As far as you know, is that a true statement, that in twenty-nine years, the California insurance commissioner did not bring a single case to enforce unfair claims practices acts against an insurance company?

MR. CRANDALL: Objection, misstates the evidence. The document says the appellate reports don't contain that.

THE COURT: State the question.

Q (BY MR. CHRISTENSEN) Let me do it this way. [248] Explain, please, because some of the meaning may be lost in some of the legal terminology, what are the dissenting justices of the California Supreme Court saying, here?

A I think they're saying, clearly, that there's no reported cases, in the cases in California, of an insurance commissioner taking action against an insurance company, up to the point of this decision, for unfair claims practices.

Q Is that unique to California?

A No, it's not.

Q Was subsequently a taxpayer's suit brought against the insurance commissioner in California to try to force the commissioner to take some action?

A It was.

Q I'm going to hand this to you. What is this document that I'm putting on the screen?

A It's a modified order issuing a writ of mandate.

Q What's a writ of mandate?

A A command to do something, basically.

Q Is that a method a court has to order a public official to do their job?

A Yes, that's one mechanism.

Q All right. And moving to another page of [249] this order, let me have you start right here, where it says, "Were it not for the evidence presented here." And read the part I've underlined, please.

A Okay, "Were it not for the evidence presented here, this trial court might share in the optimism of the Moradi-Shalal majority. Unfortunately, the evidence presented demonstrates that the commissioner has violated 790.05," which is part of the unfair act, "first, by failing to comply with its mandatory requirements, and secondly, to the extent that the statute gives the commissioner discretion, by failing to exercise the discretion.

"Respondent's own statistics show that over the past five years literally thousands of complaints have been made to the commissioner. Furthermore, respondents complained that the justified complaints have increased year to year from 50 to 400 percent. Yet in the past five years, the commissioner has issued only three orders to show cause pursuant to section 790.05, and not one of these was issued against a major insurance company."

Q What is the court saying here?

A Well, this was filed after the Moradi-Shalal decision. Remember, before Moradi-Shalal, the Supreme Court said you can sue directly the insurance companies [250] for disobeying this rule.

MR. CRANDALL: Objection, not responsive.

THE WITNESS: I'm giving the background.

MR. CHRISTENSEN: I think it's responsive.

THE COURT: I'll allow it, overruled.

THE WITNESS: What happened is after the Moradi-Shalal decision came down it said, "No, the Unfair Claims Practices Act, that's the insurance commissioner's job, they can enforce that."

It wasn't happening. So what happened is, people's rights to sue for the violations of these things were taken away, and the commissioner wasn't doing the job to take up the slack. So the taxpayers in California brought a lawsuit and got an order, a writ of mandate, ordering the commissioner to do her job, and to start policing, and put more teeth into the regulations. And so we're still struggling with that now. There's still no major cases --

MR. CRANDALL: Objection, Your Honor beyond the scope of the question.

THE COURT: All right, sustained.

Q (BY MR. CHRISTENSEN) Okay. Thank you. Now, is this just the situation in California that the insurance commission has not been enforcing the Unfair Claims Practices Acts against major insurance companies?

[251] A No, it's not.

Q Have you done some research to determine whether that has also been the case in the states that we've listed up here on the board?

A Yes, I have.

Q What have you done in that regard?

A I did a name search of cases, so I could look for reported appellate cases, like in the dissent in Moradi-Shalal, where the commissioner, or the director's name was in the caption, with a Lexus computer search, which gives us all the reported cases, and found a number of commissioner cases, but most of them dealt with solvency, as a regulator or a liquidator taking over those companies. Nothing, or essentially very few dealing with unfair claims type problems.

And then, as counsel was suggesting, this deals with appellate decisions, and a lot of times the remedies by the commissioners are administrative proceedings. Many times they don't go to court to sue a company, they take administrative action against companies. That's what they're supposed to do, have administrative hearings, like little mini-court hearings, you know, file the charges against them and have them come in, and then if they do something bad, fine them. I mean that's what they're supposed to do to [252] deter it.

So I also looked at administrative actions that commissioners have taken, not only in California, but in the states where all the regulators who are going to testify here come from, to see if they were doing anything of a regulatory nature, fining, commanding them to stop, orders to show cause, anything that they might have the power to do, and I generally found that there was a lack of action.

I ran statistics, I asked the NAIC for their database to get information on the number of administrative actions taken against State Farm and other major companies across the nation. Same thing, basically. I think I saw that there was something like $82,000 in fines against State Farm in the last, I've got the data, I think it might have been ten years back.

Mostly commissioners publish in their monthly newsletters what action they take against companies, so I got the newsletters, and I looked through that to see what action. The same absence of action, the same absence of actions against, not only State Farm, but other major companies.

Most of the administrative action they take is against little companies, agents, brokers, licensees, insolvent companies, et cetera. Very few against, I [253] mean very few, we're talking about a handful over many years against large insurance companies and State Farm. And I have the reports.

* * *

THE COURT: Let the record show the jury's left the courtroom. We have a number of matters to take up, why don't we take a short recess and come back maybe in ten minutes, and then deal with the issues that we [254] have to cover outside the presence of the jury.

(Brief recess.)

* * *

[257] * * *

THE COURT: I think that my own sense of candor, after the matter's all resolved and the jury's made a verdict and whatever, I'm going to tell them who paid for the lunch after the first of July, but I think, for the time being, it's probably just as well not to give any further indication about that, just provide them lunch every day.

It seems to have satisfied their need, they've been quite appreciative in their expression and their reaction to what's been provided. And my own sense of how to make this very long and difficult experience work for the jury, I, frankly, think it's a very effective system, I don't have any quarrel with it.

It seems to me that the jury has come in the [258] morning, they're alert, and relieved to be relieved of jury duty by 2:30 in the afternoon, has assured us a much more attentive jury than if we were carrying on until 5:00 or 5:30 after a lunch recess.

So I feel it's working, and if that arrangement works for you, we'll go ahead. And as soon as you're prepared to, I don't know what arrangements you've made for tomorrow, but let's just, if you haven't made arrangements for tomorrow, let's change it tomorrow. If you had, then let's change it for Friday and begin then.

Any comments or anything about that, before we move to the next item? Hearing none, let's go on to the other issues.

On the Singh settlement, Mr. Belnap asked if he could have a hearing on the record out of the presence of the jury on that issue. I think it's an important issue, and Mr. Belnap, why don't you address the court on that now.

MR. BELNAP: Your Honor, we had a discussion a week or two ago about talking about verdicts or judgments, I can't remember which word we used, but trial results coming into evidence in other cases. Your Honor indicated that those had been discussed in a deposition, that there was going to be some latitude [259] given in that regard.

In this particular area, Your Honor, where you're dealing with a punitive damage claim that has to sit on the merits of this case, with this jury, with the facts in this case, for them to determine the amount that they think is appropriate, we don't think it's appropriate to mention any verdicts or judgments. But we've argued that before.

It seems entirely inappropriate to talk about settlements. And if that door is opened, I don't know how a person on the other side of that door can respond to it, other than say, for instance, taking Mr. Prater's ninety cases that he's cited in his materials, and going through and talking to the jury and him about each one of those cases, and what they were resolved for, which, for the most part was, you know, relatively insignificant numbers.

Or one of the witnesses that the plaintiffs designated in this case, Mr. Thur, who Mr. Prater has talked about being involved in the Singh case, who's had, I think ten or eleven cases against State Farm in his career. And the majority of those have resulted in, results of those cases that have been tried that are low numbers. There's been, I think he had two cases that have been at the range of a million dollars, but he's [260] had a number of cases where there have been verdicts down below $100,000, and no finding of punitive damages.

And it just, in terms of the defendant's position, to bring in evidence of what parties paid in a settlement of a particular case, and Mr. Humpherys' argument at the bench was, well, Your Honor, "Mr. Belnap asked Mr. Fye about a settlement." They brought it up, Your Honor. And they misrepresented the record on that case, or at least left it in what we perceive a misrepresented state, to imply to the jury that that's what that case resulted in as a bottom line. And Mr. Fye knew that it didn't. And that's why we were left with no position other than to go into it and talk about the fact that the case was settled.

And to say that opens the door to the Singh settlement amount, and makes that probative, we just don't agree with, Your Honor. And don't see how that can have any relevancy to this jury. And certainly, if you weigh the 403 aspects on top of that, it makes it even more of a problem, in our view, Your Honor.

MR. HUMPHERYS: May I short circuit this? In reflecting through the kinds of things that this issue will open up, I think the plaintiffs are willing to stipulate, we were concerned about them getting into what ultimately happened in the $100 million verdict. [261] If we can have a clear understanding and stipulation we're not going to be going into the results of the other cases, on both sides, we'll just leave it alone, and we'll just stipulate to it. But it needs to go both ways.

MR. CRANDALL: As an out-of-towner, I'm shocked. I hear that they presented evidence in this court that there was a $100 million jury verdict against State Farm. Knowing that it was settled for a million dollars, they now want this court to allow the jury to decide this case with that kind of distortion?

MR. HUMPHERYS: That was cleared up, counsel. You weren't here. That was cleared up by counsel when he said it was settled for cents on the dollar. And the purpose of that had nothing to do with trying to determine the result. It had to do, and the thrust of it was whether or not State Farm was changing its practices based on substantial awards against it.

But apart from that, there was the evidence presented, they got in the fact that it was settled for cents on the dollar. Now if they want to say, "Okay, let's don't get into the Singh settlement amount," that's fine. But let's have it apply both ways and from this point forward. That's all I'm saying. I mean, are you changing your position now?

[262] MR. CRANDALL: I don't think cents on the dollar shows the distortion that was allowed to go to this jury. Cents on the dollar could be 90 cents on the dollar, would be $90 million.

THE COURT: You weren't here, either, Mr. Crandall.

MR. CHRISTENSEN: The representation of a million that I first heard is the first time we've ever heard a figure.

The evidence has been it was subject to a confidentiality agreement, we certainly didn't know the figure. And Singh was apparently subject to a confidentiality agreement. The fact they paid $30 million, I guess State Farm recently disclosed in some pleadings they filed.

But if they're going to be allowed to present a number on the Texas verdict in Poston, then we want to present the $30 million in Singh. If they're going to stay out of it, we will.

THE COURT: Mr. Belnap, are you planning on putting evidence in on that?

MR. BELNAP: No, we're not going to put evidence in on the Poston case.

MR. HUMPHERYS: What about the other cases? Isn't that what you were asking, or were you just asking about the Poston?

[263] THE COURT: I was asking about that. But my understanding, from Mr. Belnap's argument, from which, frankly, I find persuasive as well, is that we are going to confuse the jury, and we're going to distort the jury's -- I'm not sure "distort" is the right word -- but we could lead them into an area of deliberation which may not be where they ought properly to be, which is on what punitive damages, if any, ought to be awarded in this case, based upon the evidence before it in this case. And my understanding of your argument, Mr. Belnap, is numbers from other cases shouldn't be in, whether high or low.

MR. BELNAP: Right.

THE COURT: Isn't that where you're coming from?

MR. BELNAP: Yes, that's our position.

MR. HUMPHERYS: And we're stipulating, and let's proceed.

THE COURT: Now, I will say that the reason that the number didn't come in, in the Poston settlement, was Fye was under a protective order not to disclose it. And I think Mr. Belnap felt the same way, at least that was what I read out of it.

If State Farm should feel like they need to put that number in, I don't have a problem with it [264] coming in, just to clarify what the record is. But I'm not going to compel that, given the positions that the parties took, that they feel under some obligation not to disclose it.

But that's -- I'm comfortable with what I hear is a stipulation from both parties that we not go at all into any amounts, either in settlements, or verdicts in punitive damage cases where we're at.

MR. CHRISTENSEN: Well, we're only willing to so agree if the record remains where it is. If they're going to say that even though a jury awarded $100 million, they only paid a million, then to counterbalance that, we want to show in another bad faith case they did pay $30 million, and the practices continue.

MR. BELNAP: Well, the evidence is what it is on Poston. We didn't want it to come in, we had a hearing, but it's there, whatever came in. But we're not taking it further, Your Honor.

THE COURT: All right, that's -- Then I think that matter's closed.

MR. HANNI: May I have just a minute, Your Honor, before we pass that?

MR. BELNAP: Your Honor, a couple of quick points, and that is that I think it's appropriate that [265] there be some instruction given the jury that results, any evidence of results in other cases is not evidence of what their determination on damages should be under these facts. And we would like to get an instruction on that at the appropriate time.

The other problem, I don't know that we need to go into this, other than just to mention it, given the stipulation, but any time you start bringing in evidence of settlements, it's against public policy, and it goes to the fact that there is a policy to settle cases. And if you throw those around it chills that policy.

THE COURT: Well, it seems to me that that's one more reason that the argument that you make today not to get into the Singh settlement amount is an appropriate argument. As far as the instruction goes, I think that may be meritorious.

And as Mr. Humpherys has indicated to the court, the reason that came in wasn't to suggest a number, it was to give evidence that goes to other issues of State Farm's responsiveness. And that issue, now we've heard a lot of testimony on it, and the parties have agreed to leave it where it is, may well warrant an instruction as to damages.

We're going to have to cover jury [266] instructions soon, and what I would do is invite you to prepare an instruction to that effect and submit that to counsel and the court, and we'll take it into consideration.

All right, let's take up the issue of the appropriateness of abusive litigation tactics as evidence in a punitive damage case.

MR. BELNAP: Was that just a matter to indicate on the record what we discussed at bench?

THE COURT: Well, I think it is, but it's an important point. Mr. Crandall expressed some strong feelings, as well as strong views about that, and I think he ought to be given a fair chance to make a record, and I want to hear from Mr. Humpherys. And I think I ought to make at least some record as to why I ruled as I have.

MR. CRANDALL: Thank you, Your Honor. The witness was being questioned about trial tactics in the Singh case, and led to be saying there were dirty tactics employed by State Farm because they hid documents, they lied to the court about not having documents, and they didn't comply with the discovery rules.

And the things they did in responding to discovery, the answers they provided in their formal [267] responses to discovery, and the answers in court by attorneys and witnesses and Mr. Kodani, who was a witness and an attorney, were false.

And since that's a California case, I just wanted the court to be aware that in California, we have civil code section 47-2, subsection B, it's referred to as the litigation privilege, and there are many cases that have held that any communicative conduct during the litigation process is, in fact, privileged.

With regard to the Singh case, it's now known that State Farm, after settling, turned around and sued the plaintiffs to get the settlement money back, on the ground that the case was an absolute fraud to begin with, and it was subsequently discovered.

The federal court threw out the case and said, "Under the litigation privilege, it doesn't matter that the Singhs cheated, lied, and stole your $30 million, it's privileged." And under the theory that what's good for the goose is good for the gander that I believe I heard earlier today --

THE COURT: We've bandied that around a number of times.

MR. CRANDALL: And I think it's a very good legal maxim. Plaintiffs can't come in here and now say, "State Farm did this and that in the Singh case," when, [268] in fact, everything in that case has been ruled to be subject to the litigation privilege.

So what lawyers do in litigation, according, at least, to the California cases, should be exposed in that case. And to avoid second, retaliatory lawsuits, we have a public policy there that bring it out in the trial, or it's forever privileged, and it cannot be the subject of a second lawsuit.

Well, it seems now that the plaintiffs in this case are requesting punitive damages based on actions taken by State Farm and its lawyers in California, when that action is, as a matter of law, absolutely privileged.

And the cases which I could provide to the court, Silberg versus Anderson is probably the leading case, says that it cannot form the basis of a lawsuit or a cause of action.

But it seems here that testimony's being allowed to go to the jury, which would support, in fact, a punitive damage award. So I think it's clearly prejudicial, and it's inappropriate, and that's why I wanted the record to reflect that I think it was improper and prejudicial error to allow the witness to testify to that.

And also, it's opinion testimony by a witness [269] who read transcripts of what was happening, so it's based on, I think, improper hearsay. So I think you can base an opinion on privileged information, and privileged actions. And thanks for allowing me to present that argument on the record.

THE COURT: Thank you, Mr. Crandall. Mr. Humpherys?

MR. HUMPHERYS: Your Honor, this issue is addressed in pretrial motions extensively. The court ruled that the plaintiffs could not demonstrate the improper litigation tactics used to take unfair advantage of claimants, and used in concealing its wrongful conduct as it pertained to the present case, because it made the court, or potentially made the court and counsel witnesses, and it opened up a Pandora's box.

The court, therefore, precluded us from going into the issues that have occurred in the present case, even though, as I heard Mr. Prater testify, I could think of a number of occasions in the present case which would be examples of the very things he was testifying to.

But in any event, the court did rule and allow us to use examples and opinions based upon other cases where these tactics have been used, which I think we were very careful to stay away from the present case, [270] at least as far as discovery disputes are concerned. We certainly went into some of the depositions, such as Ms. Moredock.

THE COURT: Murdock?

MR. BELNAP: Moredock.

MR. HUMPHERYS: Tracy Moredock, I'm not sure if it's male or female.

MR. BELNAP: I'm sure it is a male, since I sat in his deposition.

MR. HUMPHERYS: We'll correct the record that way, it's a he. And Mr. Mendoza. But that was an area not subject to a dispute, and we weren't getting into discovery disputes and orders of the court. But only the actual testimony of the witnesses.

In any event, as Mr. Crandall talked about a litigation privilege, I think it should be pointed out that we would have to defer somewhat to his representation regarding the case, because we understand Mr. Crandall is the one who has now sued the Singhs and Singhs' attorneys. And based on fraud, and the court threw it out. And I don't know all of the reasons why, but I'll take his word for it.

But I understand from Mr. Prater that Mr. Crandall was taking just the opposite position now, as he's appealing to the ninth circuit. But I [271] understand that we have to take positions in our respective cases that apply, and that's fine. I understand that.

But we are not asking for damages due to what happened in the Singh case or any other case. We are asking, and certainly compensatory damages have nothing to do with it. We are asking for punitive damages based upon the experts' opinions of these tactics that are used to oppress and to conceal evidence, and to take unfair advantage of claimants.

And I think, during the bench, the court set forth in explanation of Mr. Crandall that the very things Mr. Prater was testifying to the court had seen done, and had happened and occurred in the present case, even though we were not allowed to go into it.

So therefore we see a distinction from what Mr. Crandall is raising. We are not asking the jury to award us damages

for what occurred in the Singh case, but we are asking for punitive damages to arrest and stop these tactics and these oppressive kinds of techniques which have been used by State Farm generally, and the Singh case was used simply as an example of where and how it had been done.

So I see a significant distinction on what he is saying versus the reason we were presenting the [272] evidence in plaintiff's case.

THE COURT: Well, I appreciate the comments on the record, counsel. And I think it, just for a preliminary remark, I should say that there are two aspects about this case which I think are quite pertinent to the particular issue.

One is it's a punitive damage case, among other things, there has already been a case that has been tried to establish why, by the very nature of what the issues in this case, I believe it makes it somewhat unique to just garden variety litigation.

And secondly, on the argument of the defendant in this case, the court was persuaded that it would be inappropriate to allow an amendment to the complaint based on the record that was established of stubborn litigiousness, that was based on the record that was made in this case, or otherwise allow testimony into this case before this jury as to the tactics that have been engaged in by State Farm, which arguably have been abusive or inappropriate. Those matters have been eliminated from the case to be presented before the jury.

The court's view was that the issue of abusive litigation tactics, as a number of other issues which are being presented to the jury, are appropriate [273] for this punitive damage trial, but require something of a threshold to be established. I'm quite aware of, and appreciative of the rights of parties to engage in civil litigation, both as plaintiffs and defendants,

and the right to exercise their, protect their interests in engaging in that part of our judicial system which is protected Constitutionally, as far as I'm concerned.

And I believe that some threshold must be established to allow evidence of an abuse of that process in a punitive damage case. And we've had substantial hearings on what is required to go into pattern and practice evidence under Rule 403 and 404 and 406, and all of the record that has been made on the subject.

And I would say that, in the court's view, there would be a higher standard in place before one could get into litigation tactics than perhaps other evidence, because of that Constitutional right, and the fact that it's not going to be an ordinary thing to be able to bring evidence in one case as to how a party's comported itself in another without some foundation being laid.

But it's the court's view that there has been substantial foundation laid as to State Farm's abusive use of the litigation processes, and the evidence that [274] came in today on the Singh trial seems, to the court, to be consistent with other evidence we've heard from Mr. Fye, from evidence that we've seen from the court's records, from evidence in the record, that Kornblum tape, and the evidence on keeping the plaintiffs tied up for months in law and motion, the use of document destruction.

There has been such a record made on the issues of document destruction, which I think were certainly framed by the Bird testimony last Friday and by other evidence that the court has before it, and from the court's own observation in the present case, the Ortiz testimony, the Mendoza testimony, the court just finds a great deal of, whether it's framed as evidence or whether it's just the proceedings before it, to believe that the plaintiffs have more than met that threshold requirement to be able to present to a jury the evidence of State Farm's abusiveness in engaging in litigation

process as a tactic to do the very things that they've been accused of, and it would be, to the court's view, probative of punitive damages.

And after having been fully apprised of this substantial record, and having heard it for many, many months, now, it seems to me that that's a subject that can be fairly raised, subject to the other rules of [275] evidence that must control. And the court, in hearing the objections that have been raised, has attempted, as best it could, to rule fairly on those objections, and be certain that the record, as it comes in, comports with the other rules of evidence once that subject becomes an appropriate subject for presentation to the jury.

So that's, I wanted to be sure I'm on record as to what the court's basis is for allowing this to come in, and I believe the record made is satisfactory to the court now.

* * *

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* * *

STEVEN L. PRATER the witness on the stand at the time of adjournment, having been previously duly sworn, resumed the stand and testified further as follows:

DIRECT EXAMINATION BY MR. CHRISTENSEN:

Q Mr. Prater, when we ended yesterday we were talking about insurance commissioners and departments of insurance. You were discussing some things you'd done to determine what actions had been taken by the departments in Utah, Nebraska, Texas, and Illinois against major insurance companies.

And let me make sure, before we move on, that we're not confused over that. Now, we put some things on the screen that related to California insurance commissioner, some

quotes from a dissenting opinion from the California Supreme Court about the lack of cases over a twenty-nine-year period, and so forth. Now, those were appellate cases, or cases that showed up in [5] written court decisions; is that what that referred to?

A Correct.

Q Don't insurance commissioners take actions through administrative things, that wouldn't necessarily show up in an appellate decision?

A Yes, they do.

Q What did you do to try to determine whether there had been administrative actions taken?

A I obtained the records from the NAIC, which keeps track of administrative actions taken across the country. The various departments report to the NAIC, which is the National Association of Insurance Commissioners, all administrative actions taken against various companies. So I obtained that data on State Farm, as well as some other major companies, going back about ten years.

I also contacted each of the departments and asked for copies of their official newsletters, because it's standard in these states, and in most states, for the commissioners to report in their monthly, or in their quarterly newsletters all of the administrative actions they take against licensees. That would be insurance companies, agents, brokers, others that have licenses to do business in the state. So I obtained that data.

[6] Now, Illinois was one state that didn't consistently keep track of, or report in their newsletter all of the administrative actions taken. They did it some quarters and not others. And so I contacted the head, or one of the heads of the market conduct division in the Illinois department of insurance, and he gave me a computer printout going back as far as the computer kept it, I

think seven or eight years, on all administrative actions, all fines assessed against insurance companies for unfair claims practices in Illinois, as far back as the computer went. So I obtained that data, as well, to fill in the gap that might exist as to what was reported in the newsletters.

Q And what were you able to conclude from doing this?

A As I expected, the data that I retrieved confirmed that the departments of insurance do not regularly enforce or assess fines against insurance companies, particularly major insurance companies, for unfair claims practices. The NAIC data, for example, on State Farm Automobile Company, went back about ten years, as I recall, and I think there was $100,000 or thereabouts in fines total assessed against the auto company.

Q In the entire country?

[7] A That's right, that was from the NAIC database. There is a public database that you can get access to if you pay $100 to the NAIC to get this information. The NAIC also has confidential information that they won't release to the public, and they have, as I understand it in talking to them, over a million complaints that they have in another computer, which are for regulators only, didn't result in administrative actions or fines, but are just complaints that they keep track of. But you can't get access to that information if you're a member of the public.

So there was, again, to confirm there was no evidence of any administrative action taken on a uniform or consistent basis against large companies, there was no evidence, when I did the legal search of the cases, like in the California court of appellate court decisions, and then I also checked one other thing.

I wanted to see, because if an insurance department takes action against an insurance company for doing something wrong in an administrative hearing and the insurance company doesn't like the result of that, they can go into court

and sue the insurance commission because they don't like the result. They don't like what the commissioner told them they had to do.

So I did a further search to see if there [8] were any cases where State Farm filed an action against an insurance commissioner because the insurance commissioner did something State Farm didn't like. Absence of cases, again.

Which suggests to me that, you know, the regulators are not concerning themselves with Unfair Claims Practices Act violations, they're not imposing fines, they're not doing things against State Farm or any of the other big companies, except for in isolated cases that the companies don't agree with.

Q You're not saying they never do it, you're saying it's rare.

A It's rare. Given the number of claims that are handled and the number of actions I saw, it's rare.

Q Based on what you know about State Farm, which was reviewed in great detail yesterday, and all of the documents and information you've seen, is there any question State Farm is engaging in unfair claims practices?

MR. CRANDALL: Objection, asked and answered.

THE COURT: Overruled.

THE WITNESS: There's no question about it.

Q (BY MR. CHRISTENSEN) Now, you mentioned a term, market conduct studies. Would you explain what that is?

[9] A Insurance departments in the various states have the right to go out and do market conduct exams, to send people out from the department to go into companies and to take a look at the companies and look at their books and records that they choose to do that.

There are few market conduct exams that have been done on a company the size of State Farm, it's always been my opinion that few departments have the resources to even

conduct such an in-depth study. There have been some done. Some with good results, some with not good results. But it's not very many.

Even in Illinois, I think they haven't done any in recent years, at least ten years, and that's the home state of State Farm. Very few departments can do an in-depth study, because they don't have the resources. Again, the manpower, the money to send people out into the companies and do a detailed, in-depth type of an examination.

So it's something that insurance commissioners can do, that they do do, and that's one of the reasons they get – complaint statistics, because if they get a lot of complaints on a particular company, and it's usually the smaller companies, the ones who don't have a good surplus or good assets. People, they're not playing their claims at all.

[10] And these are some of the fly-by-night companies. There are a lot of them that come and go, offshore companies, trying to come into states and do business and take people's money, and people complain, and the departments will go out and they'll target companies that have a high level of complaints.

And that's one of the reasons they keep the complaints statistics, to look for patterns, like Coronet Insurance Company has had a lot of action and activity from the Illinois department, because there was a lot of complaints and a lot of problems, and so they went out and did market conducts, and assessed some fines, administrative fines. And they'll do that. But they don't usually pick on the big companies. Again --

Q All right, let me ask you this. You said Illinois' regulator, Mr. Rogers, said they hadn't done a market conduct on State Farm for ten years. Does twenty-five years refresh your memory, or at least from the, since the 1970s?

A In looking at my notes, Richard Rogers says that there was probably no field market conduct exam done on State Farm in Illinois since the seventies, that's right.

Q And that's their home state.

A That's correct.

[11] Q Now, when they do market conduct studies, do they look at the files?

A That's certainly something they can do, and do do. They don't look at all of them. They look at a sampling, typically.

Q But if they look at files which have been altered or sanitized, are they going to find evidence of unfair claims practices?

MR. CRANDALL: Objection, leading and suggestive.

THE COURT: Sustained. Ask a non-leading question.

Q (BY MR. CHRISTENSEN) In doing a market conduct study, is the main effort to examine claim files?

A That could be part of what they're there doing, certainly, yes. If it's a claims market conduct. Sometimes they'll do a market conduct study to study their underwriting or sales practices. Most of them are focused. There's one problem area, and sometimes that leads them into other areas. But if things are hidden or concealed, they're not going to see them.

Q Okay. Now, let me move to another area. I'm going to put up some brief portions of some of the deposition testimonies of the people listed here. I'm [12] going to start with Mr. William McCartney, and I'll show you the front page of his deposition. Now I'm going to page 103. I asked Mr. McCartney, "Are you aware of any bad faith verdicts against State Farm?"

He said, "I am not personally aware of any, no."

"Are you aware of any punitive damage awards against State Farm?"

"I am not aware of any."

"How about class actions against State Farm?"

He said, "I think I have a general recollection of a class action suit, or a suit that was brought by some agent or former agents, some applicants, specifically female and minority applicants, who are agents, licensees, that State Farm settled within the past year or so. I do not know of any class actions relating to claims."

"This one that you do know about, was that Nebraska?"

Answer. "No, I think it was national."

"Are you aware of any cases where excess verdicts have been rendered against State Farm insureds?"

Answer. "I do not know of any personally."

"You've not heard of any?"

[13] "Well, not specifically."

Now, let me follow up on that. Now, was Mr. McCartney not only the insurance commissioner in Nebraska, but also at one time the president of the National Association of Insurance Commissioners?

A I believe that's correct.

Q He's indicated that he was only aware of one class action suit, and that it didn't involve claims handling. Let me move on. And he was not aware of punitive damage verdicts or bad faith verdicts.

As part of the work that was done on the Smith versus State Farm case in West Virginia that you mentioned yesterday, was there some research undertaken by a firm hired by the plaintiff in that case to try to find cases where State Farm had been guilty of misconduct, mainly things such as bad faith?

A Yes.

Q And was that information that you had in your materials from that case?

A Yes.

Q Do you recall what time frame that research covered?

A My general recollection, I have it in the boxes in the back, but my general recollection was it would have been in the mid-eighties, or maybe '87, [14] something like that, '88.

Q Does '87 to '95 sound right?

A That sounds about right, yeah.

Q So we're talking eight years?

A Correct.

Q Did that research involve looking into the Westlaw database for trial court cases where State Farm had been found guilty of misconduct?

A I think it was trial court and appellate court, if I'm not mistaken.

Q All right.

A And some of them they may have won. I don't remember. I mean there were some that they had lost, and some that they may have won, on appeal reversed. I remember there was a mixture.

Q But we're talking about an eight-year time frame.

A That's right.

Q And what is the Westlaw database that we're talking about, here?

A It's one of two generally-used computer databases that keeps track of published opinions. Published opinions, it's important to note, because it doesn't keep track of the unpublished ones, which are the majority. But it keeps track of the published [15] opinions. Westlaw and Lexus are the two services lawyers use to go into computers and get published opinions from various states.

Q Did that research show approximately seventy-five cases?

MR. CRANDALL: I'll object, Your Honor. Irrelevant, no foundation. The witness' own testimony indicates he doesn't know if they were won or lost. It's just cases State

Farm was involved on litigation on. Irrelevant to the subject matter of this lawsuit. No foundation, no similarity. We'd like to approach the bench.

(Side bar conference held out of the hearing of the jury.)

THE COURT: The court will sustain the objection.

Q (BY MR. CHRISTENSEN) Mr. Prater, are there a substantial number of cases disclosed in the Westlaw research that was done in the Smith case in that eight-year time frame where there have been courts around the country that have found State Farm guilty of misconduct?

A Yes.

Q Now, State Farm's position is they don't keep records of such cases; is that your understanding?

[16] A That is their official position. They've represented it many times across the country under oath.

Q Okay. Now, Mr. McCartney indicated he was not aware of any class actions against State Farm involving claim handling.

A That's correct.

Q Are there a number of class actions around the country, either currently pending, or that have been pursued in recent years?

A Yes.

Q Where State Farm has been accused of unfair claims practices?

A There are.

Q Can you give some examples of what some of those are?

A I think I referenced one yesterday that I just recently was asked to look at in Washington.

Q And what does that deal with?

A The case, it's a certified class action, recently certified, VanNoyes versus State Farm, which deals with a class of people, about 9,000, maybe more, over a period of six years

that had their claims retroactively denied, their medical claims through their auto policy, some medical coverages, the PIP coverages, where they went out to doctors and believed that their [17] benefits would be paid, and they were retroactively denied.

Q Okay, and there has not been a judicial determination, but that's allegations that have been made.

A That's right.

Q Could you give some other examples of class actions, either currently pending, or which have been filed in recent years? And before you do that, would you explain to the jury, please, what a class action is?

A A class action is a group of people that get together, that there's a common issue, that the issues can be litigated for the entire class as kind of one plaintiff.

Q Do they typically involve large groups?

A That's right. Potentially they do. And usually there's notice mailed out to people that may be included in the class, so they can opt into the class, and some of the issues can be resolved on a wide basis.

MR. CRANDALL: Excuse me, Your Honor, we'll object to lawsuits that are pending with no resolution, no findings of culpability for or against the company. It's irrelevant.

MR. CHRISTENSEN: Your Honor, why we're offering this is, we had each of these insurance [18] commissioners, which will be their witnesses, say they didn't know about class actions, other than maybe one here or there. And they're being offered to show that if there were, if State Farm was doing things that are improper, they would know about it.

We're presenting this to show that there are allegations being made, and they don't even know about them.

THE COURT: I'll allow it for that limited purpose.

THE WITNESS: There are class actions, either pending, or that have been resolved or settled, involving millions of

people in states, the ones I have in front of me are from Pennsylvania, Texas, Louisiana, California, Arkansas, Illinois, Arizona, Michigan, Alabama, Georgia, Tennessee, and Washington.

Q (BY MR. CHRISTENSEN) Okay. And those involve claims handling, allegations of unfair practices and claims handling?

A Correct.

Q I'm going to show you now, Mr. -- Let me move to Mr. Reynolds. His deposition was taken just a few weeks ago, and he was asked, "Are you aware of any punitive damage verdicts against State Farm?"

His answer is, "Not to my knowledge."

[19] "Any verdict finding that State Farm has acted in bad faith?"

His answer is, "No, sir, not to my knowledge."

"Any excess verdicts rendered against State Farm insureds?"

"No, not to my knowledge."

"Are you aware of any findings by courts of improper conduct by State Farm?"

The answer, "Not to my knowledge."

Question. "Have you been made aware of State Farm paying less than full fair value of any claim?"

Answer. "Would you restate that?"

Question. "Yes, have you ever been made aware of State Farm paying less than full fair value of any claim?"

Answer. "No, sir, not to my knowledge, I have not been."

"Are you aware of any conduct by State Farm where it treated a policy holder or claimant unfairly?"

Answer. "No."

"Are you aware of State Farm doing anything that you felt was improper?"

Answer. "Not to my knowledge, no, sir."

Question. "Are you aware of any class action [20] claims against State Farm, other than the ones you have already mentioned?"

Answer. "I didn't mention any, but I don't know of any class action suits against State Farm."

And then, question, "You are not aware of any on State Farm?"

Answer. "No, sir."

Question. "Any RICO claims?"

Answer. "None that I'm aware of."

Now let me move to Mr. Rogers from Illinois. And his deposition was taken on April 23rd of this year. I'm now going to page 46 of that deposition.

He was asked, "Are you aware of any bad faith lawsuits currently pending in Illinois against State Farm?"

He said, "No, sir, I'm not."

"Are you aware of any verdicts against State Farm in the state of Illinois for bad faith?"

"No, sir, I'm not."

"How about any other states?"

Answer. "No, sir, I'm not."

"Are you aware of any verdict against State Farm for any punitive damages in Illinois or any other states?"

His answer was, "No, sir, I am not."

[21] "Are you aware of any verdicts against State Farm in Illinois or states arising from State Farm -- " That probably should read, "claims arising from State Farm's failure to settle within the policy limits with the result being an excess verdict against their insured?"

Answer. "No direct knowledge, no, sir."

"Do you have indirect knowledge?"

"No, sir."

Then he was asked, "Are you aware of any class action lawsuits pending against State Farm?"

He said, "There was a class action regarding after-market parts some time ago, and I have no idea whether that's been settled."

The question was, "Was that in the state of Illinois?"

The answer was, "I don't believe so. I believe it was California."

"And what do you understand about that?"

Answer. "The use of after-market parts."

Question. "That's not using -- "

He said, answer, "Original equipment manufactured parts."

"Is that something you investigated here in Illinois?"

[22] Answer. "As regards State Farm?"

Question. "Yes."

Answer. "No, sir."

"About how long ago did you hear about that lawsuit?"

He said, "In the ball park of fifteen years ago."

Let's move on.

Question. "The allegation was that State Farm was using inferior parts to save money?"

Answer. "I'm not that familiar with what the allegations were."

Question. "Okay. Did you do something back then to gain more information about that?"

Answer. "About the lawsuit?"

Question. "Yes."

Answer. "No, sir."

"Or the allegations?"

Answer. "I was chairman of the National Association of Insurance Commissioners of a task force regarding the regulation of after-market parts, and was instrumental in the writing of the regulation of the state of Illinois."

Question. "And what is the regulation here?"

Answer. "Which says, if you're going to use [23] them, you must provide notice."

"Okay, the -- "

Answer. "And warranty, I believe."

Question. "The owner of the car is entitled to know you're using something other than, what's the term, original equipment parts?"

Answer. "That's correct."

"So in Illinois you would have to tell the owner of the car that, and warrant, what, that they'll be as good as the original equipment parts?"

Answer. "That's correct."

"When did that regulation go into effect?"

Answer. "Ball park, five to ten years ago."

Now, we've taken a minute to discuss that, but Mr. Rogers testified he knew of no class actions against State Farm other than one in California about fifteen years ago. He also said he was chairman of a committee that wrote a regulation on use of after-market parts.

Do you have information, Mr. Prater, that although Mr. Rogers apparently didn't know it, there was a class action in the state of Illinois dealing with the use of after-market parts by State Farm?

A That's my understanding, yes.

Q And was that settled on July 29th of 1994? Maybe I can short cut your search by showing you the [24] document in front of me.

A Apparently it was, yes.

Q This was right in Mr. Rogers' own state?

A Yes.

Q And he said he didn't know about it.

A Apparently so, from what you showed on the screen.

Q Were the potential claimants in that class about 80,000 people?

A I'd have to look at it to see. I don't recall it off the top of my head. I'll accept your representation.

Q Now, let me move, finally, to Mr. Yancey. And I'm on page 81.

"Are you aware of any bad faith verdicts against State Farm in Utah or anywhere else?"

Answer. "Not specific cases, no. I am assuming that there probably have been some, but I don't know specifics."

Then Mr. Hanni said, "Maybe your assumption is incorrect."

The witness says, "It could be."

Question. "Have you reviewed any Utah cases, whether against State Farm or some other company, where there has been a finding of bad faith?"

[25] His answer was, "I recall reviewing some cases prior to the previous trial, but I can't remember the names of those cases."

Then he was asked on the next page, "Are you aware of any cases involving excess verdicts against State Farm insureds?"

Answer. "No."

Question. "How about punitive damage verdicts against State Farm?"

Answer. "No."

And then on the next page he was asked, "Are you aware of any bad faith verdicts against State Farm, either in Utah or anywhere else?"

And his answer was, "Not specific cases, no. I'm assuming there probably -- "

I'm sorry, I put the same thing back up.

MR. HUMPHERYS: It sounded good the second time, too.

MR. CHRISTENSEN: All we need to do in this case is read the same thing twice. Here we go.

"Are you aware of any state agency or court that has found State Farm guilty of illegal conduct?"

Answer. "No."

"Okay. Let me move along. Are you aware of any class action suits against State Farm?"

[26] Answer. "No."

"Do you know what RICO is?"

Answer. "No. I know what it is, yes."

"Are you aware of any RICO suits against State Farm?"

Answer. "No."

Q (BY MR. CHRISTENSEN) Now, do some of these class actions in the states you refer to, Mr. Prater, also involve RICO claims?

A That's my recollection, some of them do, yes.

Q Is the information on class actions that are either current or recent class actions against State Farm, is that available to the public?

A Generally it is, yes.

Q Any reason why these insurance people couldn't obtain that information if they wanted to?

A No.

MR. CRANDALL: Objection, calls for speculation.

THE COURT: Overruled, I'll allow it.

Q (BY MR. CHRISTENSEN) You've testified there was a substantial number of trial and appellate decisions which the research in the Smith case uncovered finding State Farm guilty of bad faith and misconduct.

A Correct.

[27] MR. CRANDALL: Objection, misstates the evidence.

Q (BY MR. CHRISTENSEN) Well, state what those cases were, please, the ones that were uncovered with the research from '87 to '95.

A There were trial judgments and appellate court decisions where there were findings of misconduct in connection with State Farm activities and claims. And as with the areas, and there were some, as I said earlier, the majority

I think, as I recall, they were -- Well, they're all, for the most part they're mostly claims handling related.

Q Okay. Is that available to the public?

A Yes.

Q Any reason why these insurance people wouldn't have access to that information if they chose to look for it?

A No.

Q Now, the information that you found in the Westlaw data bank, would that be all of the cases of misconduct where State Farm was either found guilty of misconduct or accused of misconduct?

A No, that would be just the tip of the iceberg.

Q Why do you say that?

[28] A Because most cases settle, over 90 percent of cases settle anyway. They never get to see the light of day, the jury never gets to see all the evidence. There's been allegations against State Farm or other companies, they settle to keep it quiet.

MR. CRANDALL: Objection, no foundation.

THE COURT: Sustained.

Q (BY MR. CHRISTENSEN) Just explain why the ones that you found, in your words, are just the tip of the iceberg.

A Well --

MR. CRANDALL: I'll object, there's no foundation.

MR. CHRISTENSEN: I'm trying to lay that foundation.

THE COURT: Overruled.

THE WITNESS: Most appellate decisions in California and other states aren't published, so you wouldn't have access to them. There's appellate decisions where the courts have made a ruling, of affirmed jury verdicts, but they're not published, so they don't come out in the database, the computer database. It's only a small percentage that actually get published.

Q (BY MR. CHRISTENSEN) Now, Mr. Reynolds, one [29] of the insurance regulators, testified that State Farm must be treating people fairly, because their market share continues to grow. Do you agree with that statement?

A No.

Q And why not?

A Because market share can grow because you're doing dishonest things, as well. And just because you're selling more insurance and making more money than anybody else, doesn't mean you're doing it fairly and legitimately. Sometimes, we all know many examples, and I know personally from many cases I've been involved in, against Charlie Keating or against Millico, the biggest life insurance company out there, or First Executive Life. These people have built great empires, but they didn't do it honestly, and they had the market share, but they didn't get there honestly.

Q Let me move to another area. Do you have information, or have you seen evidence that State Farm cultivates, develops close relationships with insurance regulators?

A Yes.

Q I'm going to refer to some of the PP&Rs produced for people in Utah in this case. This is part of Exhibit 52, and has a document control number at the [30] bottom. Would you read the parts of this PP&R that are underlined, please.

A "Relationship with Utah insurance department remains very good. I feel I personally have great rapport with key members of the department. Coordination of Utah legislative matters has been good." Something, somebody, "is doing a good job as our legislative representative."

Q This is part of someone from State Farm management, and part of his goals and performance evaluation?

A I can't tell whose it is. I'll accept that.

Q Well, the names have been redacted. All right, the control number is DF, 05-03-96, 05699.

MR. CRANDALL: That's a different page.

MR. CHRISTENSEN: Oh, I gave you a different page? All right, let me put up the rest of these pages.

Q (BY MR. CHRISTENSEN) Here is another PP&R, and this is document control number 05691. Would you read the part that's underlined, please.

A "Have maintained very good relations with Utah insurance department and Commissioner Harold Yancey. Successful 1986 Utah legislative session."

Q I'm going to put up document 05701. Would you read the underlined part, please?

[31] A "Maintain excellent rapport with Utah insurance department."

Q Let me put up document 05704. Would you read that underlined part, please.

A "Rapport with Utah insurance department remains very positive. I have very good relationship with Commissioner Yancey and other key staff members."

Q Now, are there reasons why it would be in State Farm's self-interest to cultivate relationships and personal rapport with regulators?

A Well, I don't have a problem with any company trying to develop a good relationship with the department of insurance. You know, that's not a problem in and of itself. It depends on why they're doing it. And I don't have any information one way or another on that.

Q Let me put up one other --

A There is a close relationship, I think that's the point.

Q Yes. Would you read number 11 and 12 on document 05711, please.

A "Involvement in legislative and regulatory activities remains at a high level. I feel I have developed even greater

rapport with Commissioner Yancy and the Utah insurance department, served on the [32] committee for the 1990 NAIC meeting in Salt Lake City." That just shows there's a close relationship.

Q All right. Let me move to another area. Do you, as part of your teaching, teach about insurance departments and insurance commissioners, and the things they do and they don't do, that sort of thing?

A Yes, I have in the past covered that subject.

Q What are the things that -- Could you explain for this jury things that insurance commissioners tend to know, and the things they don't know?

MR. CRANDALL: Objection, calls for speculation.

THE COURT: Lay some foundation as to his background that would allow him to teach the subject with some information.

Q (BY MR. CHRISTENSEN) You have done research in this case; is that true?

A True.

Q Have you read the deposition testimonies of the several insurance regulators in this case?

A I have.

Q And have you read the parts where they were questioned about information they had and didn't have?

A Correct.

[33] Q As part of your teaching, have you done studies to give you knowledge and information about what insurance commissioners typically know and don't know?

A I have studied it and talked to insurance commissioners, as well as other insurance department employees, yes, in connection with my teaching activities and my consulting.

Q Have you been a consultant for the California insurance department?

A Yes.

Q Based on what you have done and what you know, would you explain, please, what insurance departments typically know and don't know, as it relates to unfair claims practices?

MR. CRANDALL: Objection, Your Honor, no foundation regarding the knowledge of what other people know. It's only speculation.

THE COURT: Overruled.

THE WITNESS: They generally know about the regulatory issues within their states, agent licensing kinds of issues, how many people are licensed, how many companies are licensed. They have access to information about the policy forms that have been approved, and the rate issues.

They do keep track, as I indicated yesterday, [34] many of the states do have, have started to recently keep track of written complaints received, not the oral ones. Very few departments keep track of oral complaints.

They know the results of any market conduct exams that might have been conducted in their state, if they want to get that information. I mean they're kind of figureheads. They're not down in the trenches. They may not know unless they ask for it, but they have access to it. But again, most of the market conduct exams, in my view, are limited in scope, there's not many done, especially of the big companies.

They know generally what insurance commissioners are doing in other states, because they go to those National Association of Insurance Commissioner meetings. And they have meetings, and they talk about problems.

Right now there's a big problem in Illinois, a lot of states are working on it, with regards to Prudential. I think there's a ten-state market exam being done on Prudential at this point in time, keeping the Illinois department very busy.

They know about solvency problems of companies. Companies that are going down the tubes and not paying

claims because of the complaints they [35] receive, though they don't often know about it until it's too late. By the time they figure it out, the companies are already gone.

They know about premium dollars and statistical information, premium taxes that are paid, privilege taxes that are paid that come into the general revenue for the states, because most insurance companies have to pay a tax for the privilege of doing business.

They know about information in the annual statements, all of the information that the various companies will publish in their annual statements. That's public information, so they're filed usually with the departments, and so they have access to all that information.

They know about agency, agent licensing problems. Generally most of the actions they take are against agents, licensing, trust fund issues. Most of the administrative actions that I've seen have been against, like I said, the small companies with solvency problems, and against agents who take people's money and don't send it over to the carriers, and they revoke their licenses and they suspend their licenses and that kind of thing.

Those are some of the things. I mean obviously they may know individually a lot of different [36] things, but that's generally, in my opinion, the things that they know about, and they know other things, as well.

Q Based on your review of their testimonies, your knowledge of the things that they know and don't know, do you have an opinion as to whether these insurance regulators who are listed here on the board had sufficient information to determine whether State Farm was guilty of a pattern and practice of unfair claims handling?

MR. CRANDALL: Objection, no foundation for expert opinion on that issue.

THE COURT: Overruled.

THE WITNESS: In my opinion, they do not have a sufficient basis to come to the conclusions that they have come to in their depositions, that State Farm has not engaged in a pattern and practice, because there's so much that they don't know about. And they've admitted that in their depo. And plus there's other things they admitted they don't know about, which would be important in my mind to know about, at least generally, before you come to a conclusion.

Q (BY MR. CHRISTENSEN) Okay, they have not reviewed the information in the boxes you have here?

A Not to my knowledge, no. In fact, they were [37] asked that, if they'd seen State Farm manuals, and no, no, they haven't seen them. They don't know about the validity of the complaints. A lot of them just keep track of complaints, without knowing if they're valid or not.

They don't know about the confidential settlements that are entered into. They don't know about the number of insureds or claimants who have been treated unfairly, who don't file written complaints. They don't know about the day-to-day management of State Farm, how the companies are trained, what manuals and procedures and guidelines were utilized, unless by chance they discover some of that in a market conduct.

But I've seen no evidence that they've done that. And plus you have to keep in mind that State Farm, in my opinion, as I stated yesterday, they're experts at keeping things secret. So they're not going to know about anything that's kept secret. Just like most of the public doesn't know.

Q Let me move to one other thing quickly. Was the insurance commissioner who was commissioner before Mr. Yancey, was his deposition taken in this case, a Mr. Roger Day?

A Yes, it was.

Q Let me show you a statement he made on page [38] 16. By the way, did Mr. Day indicate he had concerns that State Farm was engaging in some unfair claims practices?

MR. HANNI: Your Honor, I'm going to object to this. Roger Day is here in Utah, he's subject to subpoena. And if they're going to use his testimony, they can bring him in here, not use a deposition. It's an improper use of a deposition.

MR. CHRISTENSEN: This is all part of what this expert has reviewed, Your Honor.

MR. HANNI: But he can't put that up on there when the live witness is here and subject to subpoena, Your Honor.

THE COURT: I'll allow you to ask the witness about how he formed an opinion based on that, but not put Mr. Day's testimony in through him.

Q (BY MR. CHRISTENSEN) Did Mr. Day indicate that he had some concerns that State Farm was engaging in unfair claims practices?

A He stated that he had some current concerns, yes, that State Farm's settlement practices were aggressive, I think was the word he used. Yes.

Q Did he indicate that a lack of resources hindered his ability to follow up on that?

MR. HANNI: Your Honor, that's pure hearsay. [39] I object to that.

THE COURT: Sustained.

MR. CHRISTENSEN: I have nothing further.

MR. HUMPHERYS: Your Honor, there is one question on Exhibit 127 that I need to ask the witness, it's the specific documents that we claim have been destroyed.

THE COURT: All right.

DIRECT EXAMINATION BY MR. HUMPHERYS:

Q Mr. Prater, you had a chance to look at Exhibit 127?

A Yes, I have.

Q Okay.

MR. HUMPHERYS: Your Honor, what we are doing is, we're going to be reviewing from the, removing from this exhibit the reference to Article 12, and otherwise it will remain intact. So my question will be relating to all the other document, other than Article 12.

THE COURT: All right.

Q (BY MR. HUMPHERYS) Based on your best information and belief, Mr. Prater, are the documents listed on Exhibit 127 documents of which you have knowledge of whether or not they exist?

A To the best of my knowledge, I have not seen [40] or received these documents. Is that your question?

Q Yes. And are you aware that they do exist, to the best of your knowledge?

A I believe they that they do.

Q They do exist?

A Do exist.

Q But have they been destroyed after they existed, is what I'm trying to ask you. To the best of your knowledge, do they presently exist? Let me put it that way.

A Not to the best of my knowledge. I mean I don't have them.

Q Have you seen them anywhere else, at least presently being available?

A No.

MR. HUMPHERYS: All right. We again offer Exhibit 127 into evidence, with that modification.

MR. BELNAP: May I ask counsel a question?

THE COURT: You may.

MR. HUMPHERYS: Your Honor, in discussion with counsel, we will offer this after further review and discussions together, so that perhaps we can get to a point where there's the least amount of controversy between the two of us.

THE COURT: That'll be fine.

[41] Mr. Crandall?

MR. CRANDALL: Thank you, Your Honor.

CROSS EXAMINATION BY MR. CRANDALL:

Q Good morning, Mr. Prater.

A Good morning.

Q If I understand you, there's fifty states who don't have the resources or the power or the inclination to regulate unlawful patterns and practices by insurance companies.

A That's a little bit of a misstatement. I think I testified in my deposition I felt that there were four states that probably had the resources, if they were so inclined, to do a full market conduct exam. But I don't think that, in any state that I'm aware of, there's an insurance commissioner--and that's what I said yesterday--that has the inclination, the time, the money, the resources to get involved in the day-to-day management of a company. Any company, including State Farm.

Q What state are you from?

A I'm from California. Same state as you're from. And California is one of the four states I identified in my depo. We don't do it, we haven't done it, but possibly we would have the resources.

[42] Q Isn't it true that in California, they had an elected insurance commissioner, John Garamendi, who campaigned by saying, "I will be the insurance companies' worst nightmare"?

A It wouldn't surprise me. He's the first elected commissioner. Very consumer oriented. No longer there. He did some good things.

Q If I took accurate notes, I thought I heard you just say that no, you found no evidence of a large insurance company being fined.

A That's not what I said exactly. I said there were some isolated fines. There was an Allstate fine for $3 million that

I saw in one state. There was only a $118,630 fines versus State Farm in ten years. Against Allstate there was one for about $3 million.

Q You never mentioned that.

A I did. I said there was some sporadic large fines. But one fine against Allstate for $3 million in ten years.

Q Let's take a look at the Phoenix Journal.

A Okay.

Q It's Oakland, California, October 1, 1992.

MR. HUMPHERYS: Your Honor, I would like to object. Every time we've tried to use newspaper articles they've objected to that, and I would like to [43] do the same. I think fair is fair. It's hearsay, and it's inappropriate.

MR. CHRISTENSEN: Actually, I don't mind, as long as it goes both ways. If we can use newspaper articles. Because I would like to use some.

MR. CRANDALL: This is relevant to what this witness said, Your Honor. This is impeachment.

THE COURT: Well, counsel, you understand -- Mr. Belnap, are you comfortable with it?

MR. HUMPHERYS: It just cuts both ways. That's all we're asking for, is fair treatment on either side.

Q (BY MR. CRANDALL) I'd like to show you a document called The Phoenix Journal.

A Okay.

Q And it shows there the Phoenix rising from the flames, the logo?

A Sure, yeah.

Q This isn't a newspaper, this is a newsletter by a group that deals with, that dealt with the Oakland Fire?

A Got me. Never heard of The Phoenix Journal. If it's not a newspaper, I don't know what it is. I've never seen it before.

Q Well, let's look at it, then. You know it's [44] not a newspaper. It's not from Phoenix. It's a California product.

A Okay. I didn't know. You didn't say.

Q See, "Renewal and rebuilding in the East Bay Hills," is the subtitle?

A Right.

Q And it's in Oakland, California, as we see up on the top?

A Okay. But again, this is, I live in the area. I've never heard of this, so I don't know where you got it, or whose it is. It doesn't matter. I'm happy to answer your questions.

Q I'm just interested in the facts. Doesn't this indicate that the California insurance commissioner, John Garamendi, leveled precedent-setting charges of widespread unfair claims practices against Allstate Insurance Company?

A It doesn't surprise me. He was a consumer activist commissioner.

Q And, in fact, it says in the second column, here, that -- Let's go down to the bottom paragraph. "Garamendi will recommend the maximum penalty under the Unfair Claims Practices Act of a one year suspension of the company's license to sell new, settle new claims in the state, as well as a $1.53 million fine."

[45] A It never happened, did it? It didn't, did it? I worked on these fires, and State Farm also had charges leveled against them for the same thing, as well as a bunch of other companies.

Q I was hoping you'd say that.

A Yeah, I did.

THE COURT: Counsel, just so the court's clear, is this an auto case, or is this a property damage case?

MR. CRANDALL: The Oakland fire.

THE COURT: Just so you're aware that you're opening some doors, counsel.

MR. CRANDALL: I'm aware that the witness testified that there were no --

THE WITNESS: Auto cases, I testified to.

MR. CRANDALL: There were no big fines against big insurance companies in ten years.

THE COURT: Just be aware, you're opening some doors, counsel. I want to put you on notice.

Q (BY MR. CRANDALL) Is John Garamendi, the California commissioner of insurance from 1990 to 1996, a liar?

A I wouldn't call him a liar. He's no longer a commissioner. He's in Washington now, working in the Clinton administration.

[46] Q As a matter of fact, while Garamendi was the insurance commissioner, he was very pro active.

A That's right, the first time that we had an elected commissioner he was pro active for consumers.

Q And campaigned that he'd be against insurance companies?

A I don't know that's true. He campaigned about a lot of things, and certainly a lot of things he had to say insurance companies didn't like.

Q In fact, he ran for governor, is why he's no longer there?

A Well, he did run for governor, that's true. But I don't know if that's why.

Q This is your home state, isn't it?

A And yours. I'm actually from Washington, but I came recently from California.

Q He didn't run for re-election for insurance commissioner, he ran for governor?

A That's right, he did.

Q Now, this is a news release from John Garamendi, and it says, "Garamendi testifies on lessons learned from the 1991 Oakland fire storm."

A Uh-huh.

Q Do you see that?

A Yes, I do.

[47] Q And it talks about one of the worst disasters in the nation, and how twenty-five people were killed, and 3,000 homes were burned. And we recall the terrible scene on the television.

A Yes, I worked on some of those cases.

Q And then it says, "While some insurance dealt fairly and squarely with their policy holders when it came to adjusting claims, others engaged in outrageous and despicable practices, which enraged homeowners and brought the full weight of the department down on them. In one instance, we levied the largest monetary penalty in the department's history, $1 million on an insurance company, after they were charged by us with hundreds of violations." Do you see that?

A I see that part of it, that's right.

Q Let's look at page 2. And then I'll show you the bottom, here, it shows page 2.

A Okay.

Q And it talks about how they investigated the claims, and how they tried to help with all of the problems.

A Okay.

Q Do you see that? And he met with people. Do you see that?

A Do you want me to read the whole thing, or do [48] you want me to just -- Why don't you point it out to me where you say, "Do I see that?" I see a lot of words up there.

Q It says the insurance companies weren't doing all the things we wanted.

A That's your take on it. It would be nice to see the whole document so we can see what it really says.

Q I'll be glad to have you see the whole document.

A I can read it.

Q Look down at the second-to-the-last paragraph in the bottom, "I ordered the department to initiate market conduct examinations on five major companies alleged by policy holders to have acted improperly, one of them being the company that was eventually fined $1 million. I asked all the insurance companies to report to me on their efforts to resolve outstanding issues to the satisfaction of their customers."

And if we go over to page 3, and I'll show you on the bottom, it says page 3, second paragraph, "In September we charged Allstate Company and eight of its agents with 153 underwriting and claim handling violations. We alleged the agents falsely misrepresented policy coverages to fifteen policy [49] holders, and that the company failed to properly handle the claims of ten other policy holders. Three months later, Allstate paid a $1 million monetary assessment to settle these charges." Do you see that?

A Okay.

Q So?

A Five major companies.

Q Would you agree, then, that your earlier testimony that Allstate got away with the fine and got out of it, was incorrect?

A I don't know for sure if they did or they didn't, based on the newsletter. And again, Allstate's had some fines, but it says they took action against five companies. And it's too bad you didn't ask Ina DeLong about that, because Ina DeLong was working with Commissioner Garamendi in connection with this.

MR. CRANDALL: Your Honor, I will move to strike the editorial comments after he responded to my question.

THE COURT: Granted.

THE WITNESS: Who were the other five companies?

Q (BY MR. CRANDALL) Could you simply answer my question? Isn't it true, now that you see this, that your earlier testimony under oath that Allstate didn't [50] pay a fine, was wrong?

A I don't know that that proves it. I will check it when I'm back in California if you'd like. And maybe they did. Maybe they did.

Q So Mr. Garamendi's press release is a lie?

A I'm not saying it's a lie. I'm saying maybe they did --

Q In fact, isn't it true that you came in here and recklessly made a statement that no big companies has ever paid a significant fine, when, in fact, you didn't even have the information from your own state?

A That's not what I said. I said it's few and far between. There have been a few big fines. I've searched the records, and I told you about a $3 million one against Allstate that you didn't mention.

This particular one doesn't surprise me, it's a fire case. I searched the auto cases. And now you've kind of opened the door on the fire cases, I think Ina may have to come back and talk about what State Farm did in the Oakland fire.

Q You and Ina, by the way, are pretty good friends?

A No. I know Ina, I respect what she does. I respect she travels around and helps people for free. I've talked to her on a few occasions, I've met her on a [51] few occasions, and that's about it.

Q Let's talk about your homework, Professor.

A Okay.

Q I thought you also told us yesterday -- And by the way, you do require students to do homework.

A It's up to them. I mean I don't supervise it. In law school it's a little different than high school. If they want to get good grades they'll do their work.

Q And you reviewed a lot of information on this case, haven't you?

A I have.

Q And you testified yesterday that the Utah department of insurance didn't conduct any investigation into the Campbell case.

A I was asked if I was aware of any, and I said no, I'm not aware of any.

Q Isn't that pretty important, to check to see what the Utah department of insurance has done, when we're here to talk about the Campbells?

A Well, again, I was asked if I was aware of any, and I'm not.

Q Did you ever call the listed phone number for the Utah department of insurance and ask them about the investigation of the Campbell case?

[52] A I asked them about their practices generally, not Campbell specifically. About what they do generally in connection with Unfair Claims Practices Act violations.

Q Isn't it a fact that after the Campbell verdict, the Utah department of insurance did conduct an investigation?

A I don't know. I wasn't aware of it, and that's the question I was asked.

Q Let me show you a letter of December 8, 1995.

A I would expect that they would, but the question was, do I know of any, and the answer is no.

Q So you know of a lot of things that happened in Pennsylvania and Texas, and class actions about after-market parts in Tennessee, but you didn't check to see what the Utah department of insurance did about this case.

A I checked with the department generally on their procedures. I didn't get anything specifically on this case.

Q December 8, 1995. Do you see it says, "State of Utah Insurance Department"?

A Correct.

Q And it was received by Michael Arnold, that's a State Farm stamp?

[53] A Correct.

Q And it says to, "Dear insurance representative." And it's a complaint and a request that, "the problem described in this report form the subject of an independent review in your office to ascertain the validity of the complaint. Please contact us." Do you see?

A Okay.

Q And what they want was, "a brief explanation of your conclusions of your independent review, and results of your subsequent contact with the complainant, and a summary of your file on the problem described in the enclosed report form, including a list of the disputed issues, sufficient facts to allow proper evaluation, and the amount of money paid, company NAIC number." Do you see all this?

A Yes.

Q And are you aware that State Farm responded?

A I don't know what their response was. It hasn't been provided to me. State Farm hasn't given it to me, and I haven't seen it.

* * *

[56] * * *

Q Now, you know that Mr. Garamendi in California held a number of hearings regarding the earthquake and regarding the fire.

A Correct.

Q And the earthquake was October, '89?

A That's right, the Loma Prieta quake.

Q And for those who aren't in California, it might be the World Series earthquake, or the San Francisco earthquake, but in fact, it was centered out by Santa Cruz?

A Correct.

Q And so Loma Prieta is that area that's by Santa Cruz, California.

A That's right.

Q And you're aware that Ina DeLong testified at hearings before Mr. Garamendi.

A That's right.

Q And you're aware that Ina DeLong turned over [57] a bunch of paper work to the department of insurance, aren't you?

A I don't know the details of it, I wasn't involved in that part of it. I haven't attended the hearings.

Q But you read the transcript, you told us just yesterday, of the entire trial, here.

A Ina's testimony in this trial? I thought you were asking me about the details of what she did in some other forum. I read her testimony, yes.

Q And she said she turned over a bunch of documents to the department of insurance?

A I don't recall that specifically.

Q Isn't it true that to this day the department of insurance has not levied any fine against State Farm for the way it handled the earthquake, even though Ina DeLong complained?

A I don't know. I suspect that's probably true, because my research has indicated they haven't levied any fines against State Farm for decades.

Q And, in fact, as you know from the documents we discussed today, what happens is the commissioner just comes out, calls a press conference, and levies a fine, and then there's an administrative hearing to determine whether the company has to pay it. Isn't that [58] how it works in California?

A I don't believe that's how it works, no. In other words, there's different processes that California goes through, hearings, order to show cause. I don't think they just come

out into the public and say, "I fine you a million dollars, now let's have a hearing." That's not the way that I understand it works, no.

Q Did you read the press release?

A That he levied the fine and then had the hearing?

Q Yes.

A Well, if it happens that way, sometimes it happens. But that's not the typical process. And State Farm ties up the commissioner for years on the Prop 103, they're not giving the rebates, State Farm just ties them up.

MR. CRANDALL: Excuse me, I'll move to strike as non-responsive.

THE COURT: Sustained.

Q (BY MR. CRANDALL) Do you have any information that, even after considering Ina DeLong's time, the insurance commissioner, John Garamendi, even ordered hearings on that issue?

A I think that's better addressed to Ina DeLong and Commissioner Garamendi, who I know have a lot of [59] opinions in this area, including the commissioner, about State Farm.

Q Isn't it a fact that after she appeared on panels with Mr. Garamendi, and after she turned in her documents to Mr. Garamendi, and after Mr. Garamendi and the department of insurance, with all their resources, conducted a market survey, they didn't even call State Farm in for a hearing on that issue, because the market survey proved positive?

A I don't know. You're representing something that I can't verify without looking at it. But it doesn't surprise me, because it supports my point that you can't take on State Farm. It's David versus Goliath for any department, including California.

Q And Allstate's a fly-by-night operation?

A Allstate settled that case, or agreed to the fine of a million dollars, I think it said in the document. But it also said four other insurance companies. It doesn't state their name. You're asking me to speculate.

Q No other insurance companies were fined; isn't that correct?

A I don't know that. I suspect --

Q Isn't it true?

A We're talking about those fifty-five cases.

[60] Q That's after all your research.

A Uh-huh.

Q And your personal presence in the state of California, and your express knowledge of what insurance commissioners know, that you were able to find nothing that indicated that in the state of California, after all of Ina DeLong's whining and crying, the insurance commissioner took any action against State Farm?

A As I indicated, there's no evidence that they took action against State Farm, and only isolated instances against other companies. That was may point. If you think about all the millions of policies, and unfair things that are done, one situation, one fine against Allstate is not a good record, in my mind, for an insurance department cracking down on the unfair claims practices.

MR. CRANDALL: What's the --

THE COURT: Let him finish.

THE WITNESS: And State Farm is a big political lobbyist, they're very well connected to the department. Garamendi can't stand up to State Farm.

* * *

[61] * * *

Q (BY MR. CRANDALL) You mentioned on direct examination that you've consulted for State Farm.

A That's right. I've been hired by lawyers that represent State Farm.

Q And that's a big distinction.

A That's how I'm typically hired, is by the lawyers that represent the companies, not by the companies themselves.

Q Isn't it a fact that you've never been directly hired by State Farm to do any consulting for [62] State Farm?

A By somebody within the State Farm organization? That's right, because that's not the way they typically hire experts or consultants. They do it through lawyers.

Q Isn't it true that you don't even recall if, in your consulting with State Farm, you raised, you went beyond being a potential consultant to a consultant?

A I was a full consultant and a designated expert in at least one case that I recall that was pending when the Singh trial was going on.

Q Did you review the claim files?

A I don't recall reviewing the claims file. In other words, they sent me certain documents, but I don't recall specifically whether I reviewed them or not.

I do recall this. That State Farm was claiming I was their expert in the Singh case, so was Mr. Hindon. I stayed out, I didn't want to get too involved, because both sides claimed they hired me.

Q Isn't it true --

A Let me finish. During that period of time there was a case pending in Oakland where State Farm had hired me, and I was going to testify at an arbitration. And I told them, "I'm not going to come testify, because State Farm is misrepresenting the truth in Los Angeles [63] by claiming that I'm their expert to keep me out of seeing all these documents." And I was pretty offended by that. And the lawyer for State Farm understood it.

Q Isn't it true that you've never been submitted a State Farm claim file by State Farm, or a lawyer for State Farm, to act as State Farm's insurance expert in a bad faith case?

A State Farm has contended in the past I have --

Q Would you answer that yes or no?

THE COURT: Answer the question.

THE WITNESS: I don't remember. State Farm has claimed that I have, but I don't remember.

Q (BY MR. CRANDALL) So now that we analyze it, you don't remember having reviewed a State Farm claim file on behalf of State Farm, to be a State Farm designated expert, do you?

A State Farm contends that I have. State Farm contends that I have. I don't remember.

Q I'm asking for your sworn testimony.

A I don't remember. State Farm contends that I have, because they tried to allege that I was unethical.

* * *

[77] * * *

Q (BY MR. CRANDALL) Mr. Prater, one of the [78] opinions you've expressed in this case is that State Farm destroys documents to avoid producing them in litigation. Isn't that true?

A Correct.

Q Now, you, yourself, throw away your old seminar notes, don't you?

A I do.

Q And when did you start destroying those notes?

A I have some of them, I'm sure. Obviously I'm not an insurance company, so I'm not required to keep mine. But I don't keep them, I speak at lots of seminars, so I have some and I don't have others.

Q Insurance companies aren't required to keep every document they've ever generated, are they?

A Not every document they've ever generated, no. But it's nice if they'd keep their procedures manuals so juries can know what their procedures are.

Q You're not here to say State Farm violated any state insurance regulation, or any state law by throwing away old procedure manuals, are you?

A I'm not here to accuse them of that, no. I mean I think that's something that I'd have to know, you know, more about the particular law to tell you. I know there's rules on record retention, that you have to keep [79] certain records for certain periods of time, that State Farm has a record retention schedule, and a program. There's questionable practices in that program, in my opinion, and we can talk about those, but I'm not here to say they violated a specific law or regulation.

Q So you can't state any state statute or any state regulation that State Farm's record retention program violates, can you?

A Well, I don't know. I can't cite the statute number, but I can tell you generally, for example, in Illinois, their home state --

Q I'm asking you about state statutes or regulations.

A There's a regulation in Illinois which I have with me, and we can pull if we like, that says that State Farm has to keep the file so it tells an accurate story. They're supposed to keep notes, they're supposed to be retained pursuant to the state regulations, notes and other documents. There's a whole bunch of things listed that are supposed to be retained in Illinois. And in other states, as well.

Q And you're not here to say that State Farm's records retention program, or records management program, as they call it, violates that regulation. Are you?

[80] A Well, they may, because there's a section, if you look in the records management program, counsel --

Q I'm not asking what they may. You're an expert. I'm asking if you're aware of any violation of statute or regulation.

A I think there may be one, and I think, if you look at the records management program that State Farm has implemented, if you look at the program, there is a definition for something that they call non-records. Just kind of curious. It's a records management program that instructs State Farm people to destroy certain records, and then it says non-records are to be destroyed immediately.

Okay, so then you think about, "What is non-records?" You look at the definition of non-records, and it says things like -- Well, let me find it.

Q I'd also like you to find the insurance regulation you think that violates.

A Okay. The records management program we'll talk about first, and then I'll find the regulation in Illinois. The records management program requires immediate destruction of something they define as non-records. I was curious about what that was.

And they defined non-records as personal [81] tickler files. It sounds like files, to me, that people keep, as I understand a personal tickler file tells them what to do by certain dates, you know, something that might tell part of a claims story. And personal tickler files are to be destroyed. Materials developed or collected when creating an official record, correspondence, work papers, summarized materials, shorthand notes. I wonder about post-its and buck slips. We've heard a lot about those. And disks. Because we know that Noxon used post-its all the time. Bruce Davis was told to use buck slips.

MR. CRANDALL: I'd move to strike, and simply answer the question.

THE COURT: Granted, but I think -- Answer your question, but without the editorial about Mr. Noxon or witnesses. It goes beyond the scope of the question.

THE WITNESS: All right.

MR. BELNAP: What are you reading from, Mr. Prater?

THE WITNESS: I'm looking at my notes.

MR. BELNAP: Do you have a trial page on it?

THE WITNESS: Let me find it. If you look on the -- You have the records management manual?

MR. BELNAP: Yes.

THE WITNESS: Look at page 2-3, it says, [82] "Dispose of non-records as soon as they have satisfied an immediate business need, or once transactions involving the materials have been completed."

Q (BY MR. CRANDALL) Look at the next page.

A All right.

Q 2-4, after number 8, it says what non-records, there's another section on non-records?

A There's a definition of non-records.

Q Go ahead.

A 2-4. It's not on 2-4, counsel, but let's find the definition of what non-records are. Definitions. Okay, and it gives in the examples the definitions. This isn't the definition section. It includes as non-records, as example, personal tickler files used to monitor a process until it is satisfactorily completed.

Q Would you tell us the page where you are?

A Same one, 2-3, if you look at the examples of what they define as non-records.

Q Thanks.

A And this is in the definitions section, which is on page 2-1. Work papers, preliminary drafts, summarized materials, shorthand notes and disks, they're supposed to destroy those immediately. As soon as the immediate business need has been satisfied. To me [83] that's questionable. And if you look --

Now, you want to know the Illinois regulation?

Q I'm not asking what's questionable in your opinion. I'm asking, are you aware if State Farm's records management program violates any state law or any insurance regulation?

A And I'm suggesting that that may. Because there's requirements in the state laws and regulations to retain documents that the insurance department could come in and do an audit and reconstruct the file so it'll tell a story.

Q Show me the statute.

A Let's look at Illinois' as an example. Do you have the attachment to my deposition that was taken recently? Do you have my deposition that was taken a couple of months ago? And if so, attached to the exhibits, I believe, is a copy of the Illinois copy of the regulation which I received in connection with my work in the West Virginia case. This I just happened to notice.

Q Here's your notes that document --

A No, it would be the exhibits that I brought with me to the deposition that Mr. Belnap took. I believe there were some regulations that I brought with [84] me. If not, I'll have to locate them in the boxes. Remember, my answer, counsel, is "may violate." I'm not here to act as judge and jury. I'm saying that there's a statute that's very broad, as I recall, in Illinois, talked about what you're supposed to keep. And then they have a records management program, which is a fancy word for a destruction program.

THE COURT: If we're not coming to that very quickly, I'm wondering if we shouldn't, at some recess, allow Mr. Prater to find that, and then come back to that once we've discovered it.

MR. CRANDALL: Be glad to, Your Honor.

THE WITNESS: He's got it, he says.

Q (BY MR. CRANDALL) I think we found it.

A Let's see if it's there. It has in the regulations that each company has to keep detailed documentation in each claims file in order to permit reconstruction of the company's activities relative to each claims file. Documentation is defined in the regulations as meaning all pertinent communications, transactions, notes, and work papers. Okay?

Q Let's look at the document retention program.

A Okay.

Q You've reviewed it, and you have notes about it.

[85] A I do.

Q Because, in fact, the document retention program, or the document, the records management program talks about the records that must be maintained.

A Right. But these are non-records. That's the cleverness of State Farm's definition.

Q Let's look at it.

A Okay.

Q Because it's in print.

A All right. What page?

Q It says non-records, on 2-3.

A Okay.

Q It says, "These are materials that have no apparent value to the company or a department. Dispose of non-records as soon as they have satisfied an immediate business need, or once the transaction involving the materials has been completed." And examples are, one, "extra copies of documents or reproduction of documents."

A Okay.

Q So someone destroying an extra copy still would have the original.

A That's not the problem. That's only part of what the examples are.

Q Let's go on. "Materials developed or [86] collected when creating an official record, which, after action has been completed, have no apparent or informational value." So if someone gathers data and puts it in an official record, the official record is still there. They don't need the preliminary data?

A Depends on what's in those drafts, and what they mean about establishing official records. State Farm's official letter in, I've been involved in cases where the drafts prove State Farm's bad conduct.

Q Do you keep all the drafts of all the letters you've ever written?

A No, and I'm not an insurance company subject to these rules, either, so that's a totally different focus. You can't judge me by these rules. They don't apply to me. They apply to State Farm.

Q Number 3 says, "Informational copies of correspondence and other papers on which no documented administrative action is taken." Number 4 is, "Published materials received from other departments which require no action by recipient department."

A Those are some of the other examples of non-records. I'm not criticizing some of those, I just pointed out the ones I thought were problematic, based on how I know State Farm operates.

Q Non-company books, periodicals, newspapers [87] posters, pamphlets acquired and preserved solely for reference purposes?

A No problem about that one. I have no problem with a lot of them. It's the ones I have problems with that I pointed out.

Q So as long as the company keeps a copy of the claim file, then they comply with the regulation that you're concerned about?

A Only if it tells the whole story, and they keep all the notes and work papers. But see, they destroy those, because they call those non-records, which is --

Q The notes and work papers, if they're accurately kept in that file, copies can be destroyed; isn't that appropriate?

A I think the file should tell the whole story, is all I'm saying. And there's the regulations say, "Keep notes and work papers." These say, "Destroy them because they're not records." They're something else, they're non-records.

I don't believe that. And I think there's been plenty of evidence that, in this trial and in other cases I've looked at, that they put self-serving things in files, and they destroy other things.

Q Have you talked to Mr. Cochran?

[88] A I've never talked to Mr. Cochran, no.

Q So you haven't -- Have you talked to anybody who was on the committee at State Farm to formulate the records retention program?

A I've read their depositions, and I've read the minutes of the meetings, and I've read the program itself. I've not talked to anyone at State Farm about it.

Q So you're familiar with the background and the scope and breadth of the committee that formulated the program?

A Only based on what I've read. I don't know about what other secret intentions they may have had. Only based on what I've read.

Q You don't know that they had even had a secret intention, do you?

A I think it's clear they want it to sound like a good thing. Records management, it's because we have storage problems. That's the official State Farm line on it. But I think we also have indication, as we saw in the minutes, that, "We have to take advantage of every window of opportunity. We've got 130,000 suits, we've got to destroy stuff." That's really a destruction program, to keep things --

Q Ever clean out your garage?

[89] A Not as much as I should, but I do do it.

Q Ever go through your files from time to time and clean them out?

A Sure I do.

Q How many pieces of paper does State Farm generate a year?

A I'm sure millions and millions of pieces of paper. Millions. Maybe billions.

* * *

[94] * * *

Q (BY MR. CRANDALL) You talk about State Farm has cultivated experts.

A Correct.

Q Use the same experts over and over again.

A That's right. Hundreds of times. Hundreds [95] of times. In connection with claims handling, is my criticism. Not in bad faith trials. Claims handling.

Q Because you've worked for the same lawyers over and over again, haven't you?

A I've worked for some, and I've worked for some companies that same number of times. But it's after the fact analysis, so it's totally different.

Q How many times have you worked for Todd Hindon?

A In fifteen years, probably twelve times.

Q So do you think that you are a predictable expert?

A No, the last case I had with Todd Hindon, I was against Todd Hindon.

Q So you would agree that the fact that an expert works for a lawyer, or an insurance company time and time again, doesn't necessarily mean that they're predictable.

A I will not agree with that in a million years. I've made the distinction.

Q So you're predictable?

A I'm not predictable.

THE COURT: Let him finish his answer.

THE WITNESS: I am not predictable. I've worked Mr. Hindon ten times. I've worked against [96] Mr. Hindon. I've worked for and against basically every party I've worked with.

Let me finish. I think I made it clear yesterday, and I want to, because State Farm uses predictable experts as part of its claims adjustment process. They have the duty of good faith and fair dealing, to be fair, and to fulfill this good neighbor promise that they espouse.

A predictable, biased expert is not keeping in accord with the duty of good faith and fair dealing. If you want to hire experts to come in in your bad faith cases hundreds of times, that's okay. I don't have a problem with that, because that's not the claims handling thing.

I've worked for Hindon twelve times. In fifteen years. I don't think that is anything close to Dr. Vasquez' 1,000 times in claims handling. It's a totally different focus.

Q (BY MR. CRANDALL) So it's okay for you to work for the same lawyer who is every time suing an insurance company for bad faith?

A That's not true, I just told you.

Q Once a year over a twelve-year period, and you're not predictable. But if State Farm hires a doctor time and time again, that doctor is a liar?

[97] A I call him --

Q Is that your opinion?

A I call them as I see them.

Q How many times have you talked to Dr. Vasquez?

A I've never talked to Dr. Vasquez.

Q What are his credentials?

A I'm sure they're excellent. State Farm only recruits doctors with excellent credentials, that make good witnesses. That's part of the program at State Farm on their IME doctors.

Q Are you aware of the fact that in Los Angeles county, it was the plaintiff's bar who complained to State Farm that they were having independent medical examinations conducted of Spanish-speaking plaintiffs by doctors who didn't speak Spanish?

A I don't know anything about that.

Q Are you aware that Dr. Vasquez is one of the few board certified orthopedic surgeons who, in fact, is bilingual, and can speak Spanish to Spanish-speaking patients he examines?

A I find that hard to believe in Los Angeles he's one of the few available. I know the facts, and I know the facts that came out in Singh, that he was hired over a thousand times to do IMEs for State Farm.

[98] Q And do you have any information that Dr. Vasquez was lying in his reports?

A I'm not here to comment on whether he was lying or not on his reports. I'm just stating a fact, and I've seen the practice, the procedure, the recruitment, the cultivate documents nationwide, including in Utah, in the last COR, "Get more doctors in Utah." I expect this will be a growing problem here.

Q Isn't it true that it's very difficult for insurance companies to get doctors to examine people for them, because the doctors get dragged in here to court and challenged by lawyers?

A I don't know if that's true or not. I don't.

Q You don't know?

A No. I'm sure some doctors don't want to do it, and others seem to enjoy it a lot.

Q You don't know the problems the insurance company's faced with in trying to get doctors to examine people in litigation, do you?

A I've never seen it articulated by an insurance company what the problem is.

Q By the way, it's interesting that you're saying, on one hand, if they use the doctor time and time again, then the doctor is going testify for them, but if they go out and try to cultivate new doctors, [99] that's bad for them. Isn't it better to try to get more doctors to do independent medical examinations? Isn't that a good thing?

A If you're seeking out truly independent doctors, not doctors you can influence, which seems to be the pattern at State Farm.

Q And you haven't seen, in any of the PP&Rs that you saw, that mention cultivating new doctors, that they're trying to get doctors that they can influence. It doesn't say that. It simply says, "I'm trying to develop new doctors to get new blood and new witnesses." Isn't that what it really says?

A That's not really what it says. It says what it says, but it talks about developing a pool, cultivating new doctors in the PPRs and the CORs, including Utah. And again, when you put it in perspective with the bigger picture, when you study all this stuff, it makes a lot more sense to me than it does to somebody who hasn't read it all.

Q Have you talked to the person who wrote the claim operation review about cultivating new doctors?

A Mr. Comella?

Q Yes.

A I have not.

Q Have you talked to any people in the PP&Rs [100] who said they're trying to find, cultivate new doctors, to find out what they really meant, not just your intent?

A No, I have not.

Q Would you be surprised we have testimony on State Farm's part of the case that says they're scrambling all the time to find new doctors to testify?

A I wouldn't be surprised at all with any of the testimony State Farm puts in.

Q And you wouldn't dispute the fact that it's a good thing for an insurance company to try to find new doctors to give objective examinations. Would you?

A If they're looking for new doctors to do something objectively and fairly, yes, I would think that's a good thing. And I hope they do that, because that's not been my experience, based on what I've seen.

Q So depending on the extent of the problem in a local area, getting doctors to do examinations and come to court to testify, it may be very good, and an honorable thing for an insurance company to try to find new doctors.

A New, objective doctors, yes, that'll do independent, but don't overuse the independent medical. Use it when it's necessary, be reasonable, find true independent doctors, that can be a good thing.

[101] Q And you'll agree that anybody, if it's a plaintiff's lawyer or an insurance company, that has a doctor that they're using to say just what they want to say, that's bad, that's unfair, that's unreasonable.

A I think that's right. And especially for insurance companies, because plaintiff's lawyers are not, they're not governed by the insurance rules and regulations.

Again, we have to keep in mind the regulatory environment and the fact that insurance companies, as a condition for the privilege of doing business and taking people's money in exchange for a promise, they have to follow very special rules that do not apply to the plaintiff's lawyer, they do not apply to the plaintiffs, they do not apply to Steve Prater. They apply to State Farm, and people that choose to be licensed and accept the responsibility.

Q Higher standard for insurance companies.

A That's right.

Q And you're saying that plaintiff's lawyers and Steve Praters can cheat, but that's okay?

A I'm not saying that at all. That's not what I'm saying at all.

Q Because, in fact, that would be wrong?

A I agree.

[102] Q In fact, plaintiff's lawyers have an ethical duty, as members of the bar, to be honest, don't they?

A I don't agree with that. I do agree with that, lawyers are subject to ethical duties, and they also must follow those rules and be honest.

Q And you are aware that out on the street, out in the jungle, there are a lot of lawyers out there, especially in California, that have --

A In southern California.

Q In southern California, even worse. But there are insurance mills where these lawyers just churn out medical reports and medical bills and build up cases to steal money?

A That's right. And they should be shut down, and they are. They get shut down, and they should be.

Q And in fact, the department of insurance in California has a whole separate division based on fraudulent claims to try to fight these fraudulent claims of people running into each other on purpose to make insurance claims.

A It's a bad thing, and they should crack down on them. And I agree with that.

Q And wouldn't you also agree that what the insurance adjuster is facing is really like a walk on a tightrope? The insurance adjuster has a duty of good [103] faith and fair dealing to the insured to protect them, and on the other hand, it has the duty to all the other policy holders not to waste the money by overpaying claims. And so the insurance adjuster is looking

at the case, "Was this a good one? Do I pay it? Or is it a phony one? Do I have to fight it?" And it's a tightrope kind of situation, isn't it?

A The focus of the claims adjuster should be focusing on treating the claim before them fairly, on its merits. This whole excuse about what we didn't pay or we don't pay because we are concerned about our policy holders, to me that's just an excuse.

I mean yes, you don't pay unwarranted claims, you don't recklessly pay the money. But you can't say, "I didn't pay you, sir, on your claim, what you're entitled to, because I had to protect everyone else." I think Ina talked about that. That's kind of a red herring. That's something insurance companies float out there to try and defend their conduct.

Q In fact, by state law, in most states in the whole United States, insurance companies have to have a special unit called an SIU?

A Right.

Q Where they fight fraud?

A That's right. And it's a new development [104] that most of the insurance companies have to set up special investigation units, senior referral units, to investigate suspected fraud, because there is some fraud out there. There's no question about it. And you should shut those people down.

Q So the insurance adjuster's got to look at each case on its own merits?

A That's right.

Q And it has to decide in each case whether to pay it or not to pay it. And if to pay it, how much to pay.

A That's right.

Q And every case has to be decided on its own individual merits as to value, too.

A That's right. There's individual -- I mean no case is identical. There's similarities, and you can have patterns, but every case has its own, at least one unique fact, of course. And you have to consider all the facts if you're being fair on both sides.

Q And let me ask this. There's no book that the insurance adjuster can find on the shelf that says, "Here's how much you pay for this case," because they're all unique.

A Well, that's not entirely true, because what you do is you look at jury verdicts, and you look at [105] values of cases based on what juries have done in the past, and those books are generally available. Insurance claims people are trained, and at State Farm they're trained to value claims to the penny.

Q But that's a range, isn't it? A jury sheet will give you a range?

A A jury sheet will give you an indication as to what a claim is worth, and that's what you try to predict. And that's your job as a claims person, to pay fairly. Sometimes you set a range, sometimes you don't need a range. If the claim is worth more than the policy limits, like this case, you don't even need to worry about it. You just pay it.

Q Let's make sure we're on the same wavelength. Everybody knows what jury sheets are books that are published in particular areas to show what jury verdicts have been. And so what a claims person or a lawyer can get is a list of all the verdicts for broken arm cases.

A Right. Whiplash cases, soft tissue, we see those kinds of things.

Q And you will see, if there's ten broken arm verdicts, there'll be ten different numbers.

A But they'll usually be pretty close, or you come up with a range, or a valuation. You have a pretty good feel for it when you're doing it day in and day out [106] what the claims are worth, and some of them they're no-brainers, and some of them are tougher.

Q But there's no one number that's listed in a book that says, "For this case -- "

A Yeah, that's right. Not that I'm aware of. That would be too precise.

Q So let's talk about the duty of good faith that the adjuster owes.

A Okay.

Q The adjuster in Utah, by the way, only owes the duty of good faith to the insured. Isn't that correct?

A That's correct.

Q There's no right by third-party plaintiffs, like in this case, the Ospital family or Mr. Slusher, to sue State Farm and say, "You violated the Unfair Claims Practices Act." That private cause of action is not allowed; isn't that true?

A That's correct.

Q So when State Farm people were handling this case, their duty was to act in good faith to protect the best interests of Mr. and Mrs. Campbell.

A That is not correct. That is not the only duty they have, because, as we saw in the manuals, we've looked at the regulations, the duty as a adopted by [107] State Farm in its own manuals, and it's contained in the Utah regulations, requires that State Farm be fair, not only to the Campbells in terms of a duty of good faith and fair dealing, but it also requires that they would be fair to attempt in good faith to effectuate a prompt, a fair, and an equitable settlement of the claims in which liability was reasonably clear.

And they had a duty, under the regulations, under State Farm's own manual, to pay Mr. Slusher, his estate, or

Mr. Slusher and Mr. Ospital's estate fairly, promptly, and fully. They, too, should have never had to go through the litigation. And so there was a duty violated. It wasn't a bad faith duty, was your question.

Q Maybe you didn't hear my question. I'm talking about the implied covenant of good faith and fair dealing.

A You said duty.

Q Doesn't the implied covenant of good faith and fair dealing only apply to the Campbells?

A That's right. Your next question, was there was no duty owed? And I wanted to clarify, that's not the case.

Q I think the record will reflect what my question was. But if it was inartfully drafted, let me [108] make sure we're on the same wavelength. In fact, there's no duty under the implied covenant of good faith and fair dealing State Farm owed to the Ospitals or Slusher.

A That is correct, under the implied covenant.

Q So the State Farm people are trying to watch out to protect Mr. and Mrs. Campbell.

A That's part of what they're doing, and they have duties to the others, as well.

Q And then they have statutory duties to Mr. Ospital and Mr. Slusher under the Unfair Claims Practices Act.

A That's right, or the regulations. Which have the same force or effect as law on an insurance company.

* * *

[109] * * *

Q Now, you're not here to say that State Farm always handles cases in bad faith. In fact, there's many cases that State Farm handles efficiently, effectively, and in good faith?

A I would agree with that.

Q And, in fact, you said that their practice guides and their claims manuals say nice things, and set lofty, honorable goals?

A They sure do. Some of them do. There's a lot of things in their manuals I do agree with. In [110] principle. I'd like to see it implemented, but the words are good.

* * *

[111] * * *

Q Let's talk about some of the opinions you had about companies' policies.

A Okay.

Q And some of the statements in the PP&Rs.

A All right.

Q You say that the company pressured adjusters, based upon the records you've seen, to reduce the average paid cost per claim?

A That's right. You see in several of the PP&Rs that kind of a concept discussed in different words.

Q And you've also seen in PP&Rs that the [112] company put pressure on the adjusters to lower expenses.

A Correct. I've seen that some.

Q But, in fact, isn't it true that every year from 1980, the average paid cost per claim for a third-party bodily injury claim has gone up?

A I don't know that for a fact, but it wouldn't surprise me that it's gone up. Because inflation and costs of medical care go up.

* * *

[114] * * *

Q (BY MR. CRANDALL) Do you have any information that the requests of claims management and [115] the requests of management to claims representatives to reduce average paid costs per file were, in fact, successful?

A I've seen in some of the PP&Rs where people were complimented by reaching the goals. I've seen others where they didn't reach them, because of they mentioned, "A big case came along and that changed our statistics." I've seen both sides of it, in various PP&Rs, or CORs, where they track the information.

Q You haven't studied the trend in the escalating cost of settling bodily injury claims?

A No.

Q And you haven't studied the trend in the escalating costs of collision claims, have you?

A I have not.

Q And you haven't studied the cost, or the information regarding the escalating cost of insurance in general.

A I know about the escalating costs of medical claims and medical technology from working at Allied, working on a lot of medical cases, looking at rate increases. Some years a hundred percent rate increases because of the cost, you know.

Q And you've seen in the president's message that President Rust was concerned about the [116] affordability of State Farm insurance because there were direct writers out there who were selling for less?

A I don't remember, but I'll take your word for it. I don't remember him saying that specifically. I've read lots of his messages.

Q And you've seen in the president's message that the president was concerned about pricing.

A Yes, I've seen comments on that.

Q And you are aware of the public outcry about the affordability of insurance.

A Sure.

Q And there isn't a person in our state, at least, probably including us, who doesn't think we're paying too much for automobile insurance.

A True.

Q And do you think it would be appropriate for an automobile insurance company to try to do things, if legally, to keep the costs down?

A As long as it's legal and they don't try and low ball claims so that they have less out so they can take less in and compete in an unfair way, I have no problem.

Q So you will agree that it's appropriate for a company to recognize that pricing is a social issue.

A Sure.

[117] Q And to recognize that competition is an issue, and if they try to legally become efficient, then it's fair.

A I agree with that. As long as it's legal and fair.

Q And wouldn't you agree that if a company has information that it's getting ripped off by aggressive lawyers or doctors, who exaggerate bills or fraudulent claims, that they should try to fight that?

A That it's getting ripped off? I don't know the context of your question.

Q Ripped off, it's an insurance term, it means somebody gets more for a claim than it's worth?

A I was thinking of burglaries, coming in and ripping stuff off. I didn't know your context. Ask me the question again with your definition of ripoff.

Q I'll rephrase it.

A Okay.

Q Wouldn't you agree if a company believes that it is overpaying claims because of over-aggressive attorneys or doctors who are exaggerating bills, or fraudulent claims, that they should try to do something about it within the legal parameters?

A As long as it's legal and reasonable, yes, I agree with it.

[118] Q So then the real issue that we're faced with, here, is whether State Farm was taking appropriate steps to remain cost effective and efficient and competitive in the marketplace.

A I agree with that.

Q Now, you have really three main criticisms. The first criticism is that the Excess Liability Handbook says write self-serving statements.

A Your question says I have three criticisms. I have a lot more than that. But there is a reference in the Excess Liability Handbook to self-serving statements, yes.

Q And in your opinion, that's evidence of a nefarious scheme to cheat the public?

A It's one piece of the puzzle. It's only one piece.

Q The Excess Liability Handbook. Now, let's talk about that. This is 1996?

A Correct.

Q You have it with you.

A I do.

Q And we have copies in evidence. It was written in 1972?

A That's right.

Q And it's a document put out by State Farm [119] Fire and Casualty Company.

A It's -- That's questionable, but it does say State Farm Fire and Casualty on it, but it gives auto examples.

Q It was written by Dick Aaberg, who is vice president of State Farm Fire and Casualty Company?

A His name's on it. He claims he didn't write it, wouldn't even admit he was familiar with it.

Q Whose name was on it?

A His is on it, but he, in his depo, said it's not mine.

Q Now, what year is this?

A '72.

Q Isn't it a fact that you've had documents for seven years in your possession that show that State Farm withdrew that document from circulation in 1979?

A There were two memos, '79 and '85, that suggest it was withdrawn.

Q So this was, it was issued. And in 1979 it was withdrawn.

A So they say.

Q And then in 1986?

A '85, I believe.

Q Okay, they had to remind people, "Hey, this is out of circulation."

[120] A Right.

Q I'd like to show you those.

A Okay.

Q They're marked in our case as Exhibits 67-D, the first one is February 8th, 1979, and it's called "General claims memo 79-2"? Do you have that with you?

A I don't know if it's right here with me.

Q Let me help you, because we're trying to move along, here.

A I appreciate that.

Q On our exhibit I highlighted the one thing that's important here, under paragraph 35, general claims studies and recommendations, it says, "The following general claims studies and recommendations are obsolete and should be discarded"?

A Right, and number 3 says "Excess Liability Handbook."

Q It does. So -- Now, by the way, you have seen from depositions that a lot of State Farm claims people are pack rats?

A I don't know. I've seen some people like Samantha Bird kept some things. That's what the Buried Alive video is partly directed to, pack rats don't take stuff home, don't keep it.

Q But, in fact, the world is full of them?

[121] A Sure.

Q And we're all afraid to throw things away for fear that we might need them.

A I think that's true. To a certain degree we all do that.

Q The IRS might call me eight years later, and so I'd better have this receipt.

A That's right, sure.

Q And so, although State Farm said in '79 it's withdrawn, and though State Farm said in '85, "Don't forget, this has been withdrawn."

A Right.

Q People have still come up with it.

A That's right.

Q And so let me show you --

A Were you right on '86? I was wrong?

Q It's not a matter of right or wrong.

A It's close.

Q Just a recollection issue. '86 we have general claim memo 86-05, and it talks about obsoleting documents, and it says "Excess Liability Handbook"?

A Right.

Q And by the way, obsoleted here were about twelve different documents.

A Yes. Different dates, different documents.

[122] Q Actually fourteen of them?

A Okay.

Q And you're familiar, with all the documents you've seen from State Farm, that they go through and obsolete things all the time.

A That's right.

Q So the Excess Liability Handbook is not something that State Farm promotes its people to go by after 1979; is that correct?

A Not the book itself, apparently. Again, there seems to be a lot of training that's still there based on that, but the book itself is obsoleted, as I understand it, at this point.

Q You also have criticized the claims superintendent's training manual?

A There have been several that I've seen. Are you talking about Article 12? Article 14?

Q Yes.

A Which one?

Q That's the superintendent's manual.

A Superintendent's manual.

Q Training manual?

A Well, there's a training manual, and there's a superintendent's manual that is a supervisor's manual. There's different ones. Depends on which one.

[123] Q Okay. Well, chapter 12 and chapter 13 are in the superintendent's training manual?

A No, that I think would be in the superintendent's manual. The superintendent's training manual is -- Let's just find the exact manual.

Q Superintendent's manual, Article 12? It's October, '83?

A Correct.

Q Okay. It's a 1983 document. And this is the one that talks about the first contact settlements and controlling the claim?

A Is that what you're reading out of, there? I don't have it in front of me. That's my general recollection.

Q Just suppose, in context, you criticize this as saying it had some bad language about control the claim, and you didn't like that because it talks about, "we don't want people to get lawyers" is the inference you drew.

A Okay. Well, I don't know if I'll adopt your characterization. I can look at my notes. But go ahead and proceed.

Q And you're also aware, are you not, that this has been withdrawn from official use.

A It's my understanding that it's been [124] officially withdrawn, that's right. I don't recall when.

Q But you've seen documents that it was withdrawn, I'll suggest to you, in 1990?

A I've seen testimony or documents on the topic, yes. It doesn't mean the practices have changed, but the manual's been withdrawn.

Q Well, isn't one of the issues in this case whether State Farm needs to change the way it does business?

A I think it is. I think that's a big issue in this case.

Q And isn't it true that the documents that you have been most critical of have in fact been officially withdrawn, and that State Farm has, in fact, changed those aspects? In writing.

A In writing, that's a big distinction in there. That's the problem.

Q And you claim that they're still telling people about it, and they're still using that philosophically, but it's not in writing?

A As they've been trained. They haven't been retrained.

Q I understand that's your position.

A Yeah, that's my position.

[125] Q But you do recognize, the official written documents from State Farm say, "We don't use these any more."

A Correct.

Q And then you've also talked about PP&Rs.

A Yes.

Q Because you've criticized the PP&Rs by saying they shouldn't recommend a reduction in the average paid cost per claim.

A It's not a matter of recommending, it's an expectation that relates to your salary and your increases. It's a downward pressure to keep claims payment down, is an artificial, unfair thing to do.

Q Describe it the worst way you want, that's okay.

A I'm just telling you, I'm not accepting your characterization that it's a request or something. It's a mandate.

Q I'll say it as strong as you can say it.

A Okay.

Q You're saying that these PP&Rs put pressure on the claims people to pay less than you've been paying in the past?

A That's right. Not all of them, but we've seen a good sampling of them. And now they've changed [126] that practice, and I suppose you can put that date up there. Is that what you're asking me? That they've come up with a new manual that now changed that?

Q Do you see a trend?

A I do.

Q Okay. And, in fact, isn't it true the vice president, the whole company, the claims vice president, Frank Haines published a memo to everybody and said, "We think it's an inappropriate goal to say, 'We're going to reduce the average paid cost per claim.'"

A Right. That's good, I'm glad he did that.

Q And that's because the criticism has been that you just can't reduce them arbitrarily, you've got to evaluate every case on its own merits?

A That's right. And remember what you're there for in the claims department, which is to pay claims. Not to try and figure ways out of them.

Q So you saw Mr. Haines' memo in 1994?

A I'm sure I have it somewhere in the sea of documents, but I don't remember exact words. But I know it exists.

Q And you're familiar with this argument being made against State Farm in other bad faith cases.

A It's a good reason to have the memo. Yeah, I'm aware.

[127] Q So you do realize that State Farm does listen to what plaintiffs lawyers and consultants criticize them for?

A I wish that were true, and I hope that's true.

Q Well, in fact, Mr. Haines issued a memo in 1994 saying, "We don't want to have these goals any more."

A I think that's great, and I hope that it's implemented and followed through. I'm skeptical, and I'd love to talk to Mr. Haines.

Q I forgot something even before that.

A Okay.

Q In 1992 the company changed the PP&R program, came out with a new book?

A Yes, I remember that.

Q So in 1992 they changed the program.

A That's right. That's good. But you may recall some of my testimony yesterday about that.

Q So it does appear to you that at least State Farm is evolving in its procedures as time passes.

A I would hope and wish that were true. I don't believe that's really true at this point in time from what I've seen, but I'm glad they're moving in what appears to be, if it's really implemented and it really [128] happens, a good direction.

But like I say, two weeks ago I get the case, the guy in Washington, "We got those memos. But now we've been instructed to tell our people verbally to keep the costs down."

That's the problem. You can say things in writing, but the training in State Farm is one on one. It's --

Q Let's try to be precise, here, and not mix apples and oranges. There's been two goals that have been talked about. Reducing the indemnity costs, and reducing expenses. Because aren't there two sides of the cost ledger for an insurance company, what they pay out in indemnity, and then what they pay in costs and expenses for having to handle the file?

A Yeah, but State Farm interchanges the two. They're blended. The word "indemnity cost" they get blended in State Farm.

Q But on all their State Farm documents you see there's a distinction between adjustment expenses and indemnity costs?

A I can't say that for sure. My view is it's been blended, I've seen costs and expenses. I recognize there's a difference, but I've seen it blurred in the documents.

[129] Q So could it be, then, that you have misunderstood some of the documents when you saw that they said, "I want you to reduce expenses," that you misinterpreted that to mean indemnity costs?

A Not necessarily, no. I think they've used them interchangeably.

Q Now, even today, if a claims superintendent who is in charge of four or five adjusters, in reviewing the payments, concludes that his adjusters are paying too much for soft tissue claims, it would be appropriate for him to say, "Hey, you people are paying too much on claims, reduce your payments." Nothing's wrong with that, is there?

A I think there's something wrong with that across the board. I think that's not the right way to approach it, is to put pressure on them verbally or otherwise, and say, "Hey, you're paying too much, reduce your claims." That's not proper.

The proper thing is, you know, take a look at the claims, and if you want to, you know, do better investigations, try to arrive at fairer values, you know. There's good ways to do it. But you don't put pressure on front line people to reduce their claims, because you don't know what they're going to be in advance, and you don't want to have them shackled with [130] that kind of pressure, where their professions and their rewards and their salary and their advancement and that kind of thing is based on, because it creates an incentive. As a teacher, I know that, you know, to get people to do things that are not right.

Q Isn't it true that you haven't seen one document that says if any management person refused to promote or hire somebody underneath because they didn't reduce their average paid costs per file?

A I don't recall seeing a document that said it in those words.

Q And let's talk about what Samantha Bird said about this.

A Okay.

Q Because you've read her testimony.

A Yes. At the trial or the depo?

Q At the trial.

A Sure.

Q And she said that average paid costs never was an incentive for her compensation or her job promotion. Page 180.

A Okay, I have my notes, all except I remember her generally saying that.

Q And you don't think it's wrong to negotiate settlements, do you?

[131] A Not as long as they're negotiated in good faith, and promptly and fairly. I think that's what you're in the business to do.

Q You said you didn't like the word "horse trading," because, in fact, horse trading in Utah is another word for negotiating, isn't it?

A I don't know. We're in Salt Lake, and horse trading, I've always thought of that concept as something that's not really appropriate in an insurance context. Only because there's really no negotiation that can take place when one party controls all the money and the checkbook and gets to be in charge of the negotiation.

Q I know there's not a lot of horse trading in San Francisco, but, in fact, in Utah they do it frequently here.

A Well, I don't know. Maybe they do. I'm just saying the term, to me, was not the best term to use. I like "good faith negotiation," as opposed to "horse trading." It's not a big deal, though.

Q If it's not an offensive term in Utah but is a colloquial term to mean "negotiations," you wouldn't be critical of that, would you?

A Well, except for I don't think they horse trade with their insurance company. It's not a level [132] playing field. I've got a horse, you give me the money, and you negotiate. It's a different kind of thing.

Q The context that I raise this about was, yesterday your testimony that you criticized the superintendent's manual for recommending horse trading.

A Well, that's just one of the things in the manual that I commented on. People like to horse trade, don't get horse traded into something you don't like. And I think horse trading is appropriate for horses and people that are on level playing fields.

But in the insurance business it's kind of a take-it-or-leave-it approach. You know, you hear all the testimony here about phony memos and phony authority, and, "Sorry, I only have this much authority," that's not a fair horse trading game.

Q Would you kindly find for us the word "horse trading" in the superintendent's manual?

A If it's not in that manual, it's in another one. Let me look. And it might have been the Excess Liability Manual I was talking about.

Q So if I submit, or suggest to you that the word "horse trading" is not used in the superintendent's manual, you'll agree with that?

A If it's not there, it's in the Excess Liability Handbook or somewhere else.

[133] Q But wherever you saw it, you just simply didn't like the term.

A That's not the best term for what you should be doing, in my estimation, for the reason stated.

Q But by the way, Samantha Bird testified, didn't she, that when she was negotiating with people, or horse trading, as you would say, she never --

A I wouldn't say. You would say.

Q As we would say, she never misrepresented facts to people, didn't she? Isn't that what she testified to here in this trial? Page 206 of her transcript?

A I don't have the transcript in front of me.

Q Look at your notes.

A Okay. And you're saying that she said that she never misrepresented facts?

Q Correct.

A She gave a lot of examples of things that she did do. I don't remember specifically that testimony.

Q Now, you realize that oftentimes when people submit a claim, they ask for more than their claim is worth.

A True.

Q And when lawyers are representing people, and lawyers submit a demand to the insurance company, they [134] ask for more than it's worth?

A That happens, that's right.

Q And the insurance company, in opening negotiations, will offer less than they might be finally willing to pay, so they can negotiate.

A As long as it's good faith negotiation, and there's really a need for a range, and it's a good faith range, that does happen. And I don't have a problem with it if it's fair and in good faith.

Q So the basic concept of negotiations, and manuals that talk about how to negotiate and how to close a settlement, those aren't against the law. It's how it's carried out; is that the problem?

A What the technique is that's used, and the reasonableness of the conduct, that's right. You have to look at all of it, the circumstances.

Q You'll also recall that Samantha Bird testified, after being called by plaintiff, that she never rewrote claim logs with different colored pens. On page 212, if you have your notes there.

A I have my notes. I don't have every detail. I have the transcript. If you represent it, and it's in the record, it's in the record. She said a lot of things.

Q We've been talking about a lot of State Farm [135] procedures all across the country. I'd like to digress, if we could, for a minute, and talk about the Campbell case.

A All right.

Q You've seen the PP&Rs.

A I have.

Q And you have, in fact, the PP&Rs --

A Well, wait a second, I should clarify that there's some that weren't produced. I don't have the PP&Rs of Noxon prior to 1992. But I have what's been produced, which is --

Q Ray Summers?

A Do I have Ray Summers' PP&Rs?

Q Yeah.

A We have a stack, but we don't have them all.

Q They've been produced, and I'd like to show you his PP&Rs.

A Okay.

Q That's '82, I want to start in '81. Here's a performance, planning and review. We have Ray Summers?

A Okay.

Q Field claim specialist?

A Yeah.

Q This is performance planning and review. Okay?

[136] A Okay.

Q And if you look at this, under 1, D, and that first big square, there.

A Okay.

Q It says, "Monitor and control pendings and costs by," and it has 1, A, B, C, and D is "reduce miscellaneous pendings by 10 percent by September 22, 1981, and A pendings," A means liability pendings, "to no more than thirty by year end." Do you see that?

A Yeah.

Q So, in fact, what this PP&R was requesting was to reduce the lawsuits that are pending.

A Okay. But that doesn't tell you how to go about doing it. That's just saying, "Do it. No matter how you do it, do it." And that could mean not being fair.

Q It could mean cheating and stealing.

A It could.

Q Let's look at the next page. And it talks about increasing professional proficiency and competence. Do you see this?

A Yes.

Q And it talks in the next, number 4, about maintaining subrogation recovery goals.

A Right.

[137] Q And number 5, submitting at least three agency referral cards per month.

A Uh-huh.

Q Just other things to be more professional in his job?

A Yeah.

Q And then on the final page, it has, "Reduce suit count to no more than six by end of 1981. Currently at fifteen."

A Okay.

Q So I think that explains that first page, thirty was the total number of liability claims pending, and fifteen were the suits.

A Okay.

Q So here, the superintendent is requesting Mr. Summers to reduce the suit count to no more than six, that's a 60 percent reduction from fifteen to six, isn't it?

A Okay, I'll accept your math.

Q And you'll recall the deposition, I mean the testimony of Mr. Summers here in court that you read in the transcript?

A Yes.

Q And, in fact, Mr. Summers said that the best way to reduce a pending is to settle it.

[138] A Okay. I'll accept that.

Q And Mr. Summers also said that if you low ball settlement offers, or try to settle claims for less than their fair value, pendings will triple or quadruple?

A I don't recall that specifically. But I mean if he said it, he said it.

Q Excuse me. How about Felix Jensen saying that?

A Okay, Felix said it.

Q Let me show you the next year PP&R for Mr. Summers. And before I go to 1982, your criticisms about PP&Rs about reducing average paid cost per file, that's not in Mr. Summers' PP&R, is it?

A I don't remember. I saw a lot of them, and I just don't recall.

Q So if we talk about one of your general criticisms of State Farm and this PP&R process, it's not present with Mr. Summers at the time the Campbell case was pending; isn't that true?

A I don't recall. I'd have to see it.

Q Well then, let's look at 1982. We looked at '81, the case of Ospital and Slusher versus Campbell was still pending in '82.

A Okay.

[139] Q And when you look at that, we again see it's Ray Summers, and we have his PP&Rs.

A Okay.

Q And they start out by talking about maintaining office service to insureds and claimants by being available, B is returning phone calls, and they want him to be more available to insureds and claimants and explain the company's position on losses and explaining settlements so there will be fewer misunderstandings. Did you see these things?

A Yes.

Q And then over on page 2, once again the superintendent suggests to Mr. Summers on the bottom, there, "Increase unit cost effectiveness by, A, decreasing suit files by 15 percent, from fourteen to twelve in 1982." Do you see that?

A Okay.

Q So, again, the PP&R is recommending reducing files.

A Reducing suit files, it says what it says.

Q And there's two ways to reduce suit files. Get someone to dismiss the case, or settle it.

A That makes sense, or win it.

Q Or win it in trial. And this was, by the way, reduce it by the end of the year.

[140] A Okay.

Q So, in fact, when we look at the PP&Rs of the people who handled this case in the state of Utah at the time the Campbell case was pending, we don't see this claim of decrease average paid cost per file, do we?

A Not in the ones that you've shown me.

Q And just to clarify the misstatement I made previously, let me show you the transcript of Mr. Felix Jensen.

A This is from the trial, or the depo?

Q This is from the trial.

A Okay. How come yours is nice, and mine's all -- Yours has numbers on it, and mine's a lot rougher looking? Yours is really professional looking. Mine's -- Well, anyway, let's go ahead.

Q Page 55, we're going down to this quadrant right here.

A Okay.

Q The question is, "Okay, going back to pendings for a minute, if you attempted to reduce pendings by underpaying files, what would happen in that regard, in your opinion?"

Answer. "Your pendings will probably double or quadruple."

Do you see that?

[141] A Okay. That's his opinion.

Q Are you aware of any PP&Rs of the people who were handling this case --

A Uh-huh.

Q -- the Campbell case, that said, "I'm going to reduce my average paid cost per claim for indemnity payments by low balling"?

A It would be difficult for me to answer. I've seen definite Utah "reduce PP&R" goals, but the names, and at State Farm's request, have been eliminated, so I can't tell you who they are. So I can't look at them, they have all their names taken out, so I can't give you their names.

Q Isn't it true that when you look at all the State Farm documents, that the real emphasis through the PP&Rs is constantly to reduce pendings?

A I've seen many of them that say reduce pendings, and there's been testimony about the techniques used to do that.

Q And pendings, by the way, is what they call claims that are pending, that are sitting on their desk.

A That would make sense to me, yes.

Q And, in fact, the reason why the company wants to reduce pendings is, it costs so much to keep files open for a long time. Files get more expensive [142] the longer they're around; isn't that true?

A Not necessarily, because sometimes if you keep a file around long enough, the insured dies and you don't have to pay him anything. So that's a bad way. Sometimes you drag things out, and people are old or sick, and get off paying nothing.

Q I know you're making pretty harsh accusations against State Farm, but you don't mean to tell this jury that State Farm is so cold and callous that they're going to keep files around until people die?

A I am going to tell the jury that I think they do do that.

Q You do?

A Yeah, I think that they do. I think State Farm --

Q You expect the jury to believe this?

A I think the jury can decide for themselves. This is a pretty old case, and if Mr. Campbell were to die, it would be a terrible thing.

Q In fact, Mr. Campbell's not the person who would benefit from any judgment in this case?

A Well, he would.

Q You've seen the documents.

A I have seen.

Q In fact, Mr. Campbell gets six cents on the [143] dollar. The money goes 40 percent for the lawyers, and 29 percent to the Ospitals and Slushers, who have already been paid their judgment.

MR. HUMPHERYS: Your Honor, I object on the basis that the issue of whether or not State Farm has to pay attorneys fees is yet to be decided, and that representation is not correct.

MR. CRANDALL: I'll rephrase that.

Q (BY MR. CRANDALL) The minimum amount the lawyers get is 40 percent, and maybe they get attorneys fees if any money is awarded.

A I'll leave that to the attorneys and the court and the jury on that.

Q Let me talk about some additional statistical information. Isn't it true that you don't have statistical data regarding the pattern and practice of State Farm to offer less than fair value?

A You mean numbers statistics?

Q Yes.

A It's never been produced by State Farm so I couldn't have it.

Q So you haven't done any, you haven't quantified the percentage of State Farm cases where State Farm has cheated people.

A Not in a statistical sense, no.

[144] Q So you're not here to say that they mishandle all their cases?

A That's right.

Q And, in fact, how many cases have you reviewed of State Farm, how many actual claims files have you reviewed? Would it be fair to say twenty?

A Or more. But it's not just claims files. It's depositions. And these people in the depositions have said they've handled thousands of files, "We handle them all the same way," so you've got to expand it.

Q Do you have your deposition here?

A I do somewhere.

Q Would you look at page 293?

MR. HUMPHERYS: Which volume?

MR. CRANDALL: Page 293?

MR. HUMPHERYS: Which volume? We have two depositions.

MR. CRANDALL: Oh, the first one.

MR. HUMPHERYS: Page 293?

MR. CRANDALL: That's the only one that had 200 pages.

THE WITNESS: 293?

Q (BY MR. CRANDALL) Yes.

A Okay.

Q Do you see where you were asked, "How many [145] cases have you reviewed to come to the conclusion?"

And have you read over there and go on to page 293 and 294 and 295?

A Yes. Okay.

Q Would it be fair to say you reviewed less than twenty State Farm cases?

A I'm looking for that, because it's two pages, and I'm saying your question's vague, are you asking me how many cases, or how many -- Are you talking about as a consultant or an expert? I'm trying to pinpoint the language that you're telling me. Is it pinpointable, or is it just the whole conversation over several pages?

Q Yes, the whole conversation. We don't get many pinpoint answers from you, Mr. Prater.

A You asked me how many cases, I said your question's vague or ambiguous, are you talking about cases I've worked on consultant? This, that, published cases, opinions, the question was vague.

Q State Farm claim files.

A I wouldn't be surprised if actual claims files that I've looked at would be in the twenty to fifty range. I won't quarrel with that.

Q And you will agree that State Farm's had millions of claims?

A Yes, they have.

[146] Q We do have those statistics here. If I may pull this easel forward, we'll look at some numbers. This is a bodily injury claim comparison 1980, to 1994. So it's a fifteen-year period.

A Right.

Q Nationwide there was 6,157,002?

A These are State Farm's figures, which we can't verify, but we can use the figures for purposes of your question.

Q And the claims that settled without lawsuits were 5,263,000, and there were lawsuits of 893,000.

A Okay.

Q And then of the 893,000 that got filed, 788,000 were settled, so 105,000 got tried.

A Okay.

Q Okay. And isn't it true that almost all of the claims that are, almost all claims that are settled are dismissed without a trial? If you look at nationwide, only 1.7 percent of the cases, of all the claims, go to trial.

A That's what the chart says. And I agree that most cases settle. I'm not in disagreement, I just can't verify State Farm's charts or statistics. We talked a little bit about that yesterday.

Q In fact, you hadn't verified the numbers. Do [147] you think these are inflated by State Farm, or are they underestimated by State Farm?

A I'm not going to venture to guess. I'm not going to play with the statistical game, because I think it's more important what the statistics don't say than what they purportedly do say.

Q So --

A And they're missing information. That's what I want to know.

Q Even with that information, though, you can see that twenty claim files that you reviewed is a very small percent of the actual claim files that have been generated?

A But my opinions aren't just based on claims files. That's a very small part of my opinions, the basis is claims files. It's manuals and training and depos.

Q You have seen the manuals and training materials that have been withdrawn. But the question is, you say manuals and training materials say "cheat people," but you've only seen twenty actual claim files.

A Well, you pinned me down to the number. I may have seen more. I said somewhere between twenty and fifty. I don't know. I don't have to see the claim file to be, you know, except for in individual cases, [148] I'm going to give an opinion in an individual case if there's bad faith, I want to see the claims file.

And in the last case I testified for plaintiff against State Farm, they showed me the claims file, and I didn't -- Here I am, hired by plaintiff against State Farm, looking at the claims file, and they said, "Is there bad faith?" And I said no. I called it as I saw it.

I looked at a claims file, that may or may not be bad faith based on claims files, but I'm not talking about twenty claims files. I'm talking about a lot of other stuff.

Q Is what you're telling us, then, is in the abstract, State Farm has documents that seems to tell people to do things that are unfair, but you don't know if they actually have done them in the claim files?

A Each individual claim file, I do what a claim adjuster does. I look at the individual file. I don't need to look at the individual file. I'll call the file on a file-by-file basis as I see it.

But the patterns and the practices and the training and the depositions, and the people, even in this trial, saying, even today, that "We treated Mr. Campbell fairly," that tells me a lot. They still won't admit it.

[149] Q That's what I want to look at. The pattern and practice allegation.

A Yeah.

Q Just so we're on the same wavelength. We know there were 6,150,000 bodily injury claims in the fifteen years from '80 to '94.

A As represented in those charts.

Q And you have the Excess Liability Handbook?

A I do.

Q And that, by the way, said there were 200 excess claims from '66 to '73?

A I'll trust your representation. I know there's a discussion of this, and a savings. Whatever it was, it was.

Q Do you know how many bodily injury claims there were from '66 to '72?

A No.

Q Do you think there were -- Well, this averages here about 410,000 a year.

A Okay.

Q For these fifteen years. 410,000 bodily injury claims a year?

A Right.

Q How many do you think the company had from '66 to '72?

[150] A No idea.

Q Well, the company was growing. Do you think it would be half that much?

A I don't want to speculate.

Q Let's just say, for purposes of an argument, that the company got twice as big from 1972 to 1980, and that they had half as many claims back then.

A All right.

Q And so that would be about 200,000 claims a year.

A Okay, according to their numbers, that's fine.

Q If they had 200,000 claims a year, for six years, that would be how many claims?

A I guess a million-two? I'm not very good in math, I'm sorry.

Q It's a million-two. 200,000 times six.

A Okay, I thought it was divided by something. Okay, times six.

Q So that's 1,200,000 claims over a six-year period. And we know that there are 200 excess claims.

A Uh-huh.

Q Okay?

A According to the Excess Liability Manual?

Q Yeah.

[151] A Does that now apply to the auto company, or the fire company, or how are you interpreting it?

Q This is auto. Auto bodily injury?

A In the excess liability that was done by the fire company --

Q Well --

A Okay, I'm just trying to get clear where you are.

Q Now, what is the percentage, here? Maybe we can ask Mr. Schultz to figure that out. 1,200,000 into 200 excess?

MR. SCHULTZ: .01666.

Q (BY MR. CRANDALL) .0166 percent.

A Okay.

Q And we would say that by saying 16 thousandths of one percent?

A I'll trust you. I didn't do well in math. I stopped taking math in algebra.

THE COURT: Mr. Crandall, can we stop and take a little stretch break? Let's all stand up.

All right, counsel.

Q (BY MR. CRANDALL) So if we have a 1,200,000 bodily injury claims, and 200 of those result in excess verdicts, that's .0166 percent. Now, you're a law school professor?

[152] A An adjunct professor.

Q And sometimes do you have to do tests?

A Sometimes my students get tests? Is that what you said? Yes.

Q And if, in fact, someone took a test and they got 99.844?

A They would get an A on my test if they got that score.

Q 99.98334 percent right, that would be an A.

A It sure would, on my test it would be.

Q Thank you.

A You're welcome.

Q Let me also ask you, if I drive the same way to work every day, and I go to work 250 days a year, let's assume, taking some time off on weekends, and I go through the same intersection on the way to work and on the way back, so that's actually 500 times a year I go to work, that's really 2,500 times if I go for five years.

So let's assume I go to work the same way every day, and the say same way home every day for five years. Okay? If I run a stop sign .0166 percent of the time, how many times in five years would I run that stop sign?

A I don't know. Again, do you want me to [153] calculate it out and divide it? You lose me when you start talking about statistics or numbers. It doesn't make sense to me, stop signs and --

Q I don't have a clue, either. Mr. Schultz is figuring it out.

A We've established I'm not very good in math.

Q It's .0415 percent. That's four tenths of one percent. So in five years that means I would run that stop sign never, .4 percent. .4 times out of five years. In other words, it would take twenty years before I even run the stop sign. Okay?

A Okay.

Q Would that, in your opinion, be a pattern and practice for me to be running stop signs?

A It doesn't seem to me it would be. It doesn't mean you wouldn't violate other laws, but you wouldn't run the stop sign.

Q Would you want to punish me for doing that?

A No. For not running a stop sign? No.

Q Now, one of the other things you read, here, was Mr. Summers' testimony?

A I've reviewed his deposition and his trial transcript.

Q And he, in fact, said it wasn't in State Farm's best interest to refuse to settle and take cases [154] to trial if they were going to lose them. Isn't that true?

A I don't remember if he said that specifically. He had a lot to say. A lot more in his deposition that was critical than he even got to say in trial.

Q Now, you know that in this case he said that the divisional claims superintendent knew it was a liability case.

A That's right. He knew State Farm knew, everybody knew, I think is what he said. Brown knew, Noxon knew.

Q And State Farm therefore knew it was going to lose the trial, and lose more than the policy limits.

A That they knew they were going to lose the trial? I think they knew there was a substantial likelihood, and that it was wrong to put him into jeopardy. It's a no-brainer. This trial would be lost a thousand out of a thousand times, in my opinion.

Q And isn't it true that an insurance company isn't going to make money or increase profits by taking cases to trial that they know they're going to lose?

A That they're not going to increase their profits?

Q They're not going to make money by trying [155] cases they know they're going to lose for more than the policy limits?

A If they think they can beat down the other side or get a lower jury verdict, they'll use that information, they'll use the lower verdict to say, "This is the value of cases," to other lawyers that have cases in this particular county in the future.

And one of the lawyers that testified, and I think he was an ex-state senator, or a state senator in this case testified in the bad faith trial that he had heard this verdict being used even -- Because the verdict was low, I think everybody agreed that it was a low verdict as it was.

And it was being used, even as an excess verdict, as an example to beat down other people that wanted money. So yes, State Farm has an incentive to get low verdicts, because then they can use it as evidence of the value of similar claims in the future.

Q So you expect this jury to believe that State Farm will take a case to trial with a $50,000 policy limit, and hope to get only a $300,000 judgment so they can use it in other cases?

A They were hoping to beat it. Of course they were hoping to beat it.

Q Thank you.

[156] A But they knew that that wasn't likely to happen. And they exposed their insured, and shouldn't have done so.

Q You know what the difference is between allocated adjustment expense and unallocated adjustment expense?

A Only generally. Fye talked about it, and you talked about it. I don't profess to be an expert in insurance accounting.

Q Let's go into some "Obiter Dictum" articles that you mentioned.

A All right.

Q And this is the last word, the publication by home office, it goes to all the claim offices.

A Okay.

Q And you indicated in there that there were some comments in there that you thought were too harsh or too caustic. Do you recall that testimony?

A I refer to "Obiter Dictums," not in great detail, but I do have some references to them.

Q But you would agree, wouldn't you, that a lot of these "Obiter Dictum" articles were telling the claims staff, "Hey, we've got people across the country fighting fraud, and they've been successful, keep it in mind, try to keep it in the forefront of all claims [157] people, that there's fraudulent claims out there."

A I wouldn't put that spin on it exactly. There were comments like, "Keep defenses in the forefront of your investigation," which I think is an improper focus in a first-party case. I don't think that's the proper focus to keep defenses in the forefront.

Q I was asking if an insurance company who has a fiduciary relationship to its insured, doesn't it have a duty to protect that fund of money for all the other policy holders, so they don't dissipate assets?

A We talked about this earlier, I think we've discussed this, my view on that. You pay attention to the claim in front of you. In the back of your mind you remember not to spend the money foolishly. But you don't put -- that's my point -- you don't put defenses in the forefront of your investigation.

That's not what an insured expects from their good neighbor when they have a claim and they're trying to collect money from their own insurance company, that the insurance company's going to be investigating defenses and reasons not to pay, or hiring a doctor that's not truly independent and trying to say he's independent, this is what he said your case is worth, and he's not really. That's not good.

[158] Q Well, that's one of the criticisms you had of "Obiter Dictum." And let me again digress, if I may, to the Campbell case.

A All right.

Q Which doctor did State Farm hire in the Campbell case to lower the value of the claim?

A I don't think there were any IME doctors used in Campbell that I remember. That wasn't an issue in this particular case.

Q And you are aware that plaintiff's attorneys selects the doctor they send their clients to?

A It's a different set of rules, and we talked about that.

Q I'm not asking about the rules. I'm asking, are you aware out on the street, plaintiff's lawyers send their patients, their clients, to selected doctors?

A That's right. And if they do it more than five times, State Farm says, "You're a fraud." But when they do it, they're fine.

Q At Allied General, in some of those medpay claims, did you ever have the claims staff ever have people examined by doctors?

A No, we did not. We had medical reviews, sometimes, done of the records. In appropriate cases, where it was beyond our level of expertise, very [159] complicated brain problems and things we wanted to get the bills analyzed, we used third-party review organizations. We didn't send them to IME doctors.

Q So you used a company whose business it was to review medical records for insurance companies?

A Well, not just insurance companies. We were very careful in selecting ones we felt were fair and wouldn't get us into trouble. We didn't want to get accused of using biased, predictable, or bad statistical information doctors. We were very careful about selecting our medical vendors.

Q Do you recall the names of those vendors?

A Not today. It's been a long time.

Q So if I understand you correctly, having too few independent medical examiners is bad, because they'll have too much business from State Farm, but on the other hand, trying to cultivate new ones is also bad?

A No, that's not what I'm saying at all. I think I've been clear with my answers.

Q They both can be wrong if misused; is that what you're saying?

A I think the key is reasonableness and fairness in making sure that if you're going to call somebody an independent doctor, make sure that they [160] really will. And don't cultivate them because they'll be loyal.

Remember the manuals that said, "Get doctors that'll be good witnesses." And when you're concerned about that, get doctors that are good doctors. Don't worry about how you paint it and set it up for a trial.

Q Let me suggest why that's important to know what person will make a good witness. Isn't the duty, under the policy in a liability case, to pay all sums the insured will be legally liable to pay to a third person?

A I'm talking about first party. I'm not talking about liability.

Q Oh, well, this case is --

A You've changed focus.

Q The Campbell case was a third-party case, wasn't it?

A That's right. And there was no IME doctor used here. But this case is also about State Farm's pattern and practices nationwide. It's not just about Campbell.

Q I understand. You keep trying to drag us out of Utah, but we are here in Utah, and I'd like to ask you about Campbells.

A The case is more than what happened in Utah, [161] is my point. That's why I'm here talking about all this other stuff.

Q In fact, the reason you're here is because the inability to show any damages in the Campbell case, and therefore you're trying to inflame the jury with things the company may have done in other states to hope arouse the ire of the jury, so some damages would be awarded?

MR. HUMPHERYS: Objection, Your Honor, this is an improper question. It's untrue, it's a cheap shot at the very most.

THE COURT: Sustained.

Q (BY MR. CRANDALL) Isn't the reason you're here, to try to get the jury to award punitive damages?

A I'm here to tell the truth, and I'm going to trust the jury, after they've heard the whole case, to decide what they think is appropriate. I'm not here to -- They're not going to decide this case based on what I say. They're going to consider everything, and they're going to decide it. Not me.

Q Let's talk about the truth in Campbell.

A Okay.

Q In fact, in Campbell it was a third-party case that State Farm defended, based on an allegation of no liability; isn't that true?

[162] A That's right.

Q And State Farm never made an offer, zero.

A That's right.

Q And there was an excess judgment?

A That's correct.

Q And State Farm subsequently paid the full judgment, plus costs, plus interest?

A A long time down the road, that's right.

Q Now, how many other cases have you analyzed that had those same four features?

A Many.

Q For State Farm?

A Oh, State Farm's a minority of the work that I do. Other companies. But again, it's when people say in their depositions, "We handled this fine, there's nothing bad about what we did, this is the way they do business." They think this is right.

Q I was asking you the number of cases you've analyzed.

A Okay, and I've told you many others.

Q You've seen other similar fact patterns in bad faith cases.

A Excess verdicts where they paid the judgments, yeah.

Q Because, in fact, oftentimes people go into [163] trial and say, "I'm not at fault," and the jury has a difference of opinion and finds them to be at fault.

A That's right. Sometimes it happens.

* * *

[169] * * *

Q All right, thanks. Let's talk about some of the things Samantha Bird testified to regarding the way [170] she handled files.

A Okay.

Q And you did read her testimony.

A Yeah, I read her deposition and her trial.

Q And you have criticized State Farm for the superintendent's manual saying you can settle half of the cases for the medical bills?

A We talked about something generally in that regard, yes.

Q But Samantha Bird testified that she was never taught by State Farm to settle cases by just paying the medical bills.

A Okay.

Q And she also said, not only was she not taught that, but she never did it. Isn't that true?

A That she never did what? She did a lot of bad things she admitted to.

Q She never had a first contact settlement that she settled for just medical bills?

A You'd have to show me the testimony. I'll accept your representation if it's truly being represented.

Q Page 171, lines 1 to 25?

A My transcripts are not as nice as yours, but they're in the back. And if you want to show me yours, [171] I can read it. I'll accept your representation.

Q And you then also recall that she testified that, not only was she not taught it, and not only did she not do it, but when she was a superintendent, she didn't teach other people to do it?

A Okay, I'll accept that too.

Q Would you like to look it up?

A No.

Q And, in fact, Samantha Bird said, after being called as a witness for the plaintiff, that she was always taught to be fair and to be above board and to be as decent as possible.

A I believe she said that's the teaching she received. However, she understood that term. There's a lot of inconsistencies, because she'd say that, and then she'd detail all kinds of bad things that she was doing.

Q Do you believe her when she testified that she was taught that?

A I believe that's what she believes she was taught.

Q Now, by the way, do all the students that you teach go out and do exactly the right thing in all their insurance cases?

A I'm sure they don't.

Q So, in fact, there are many instances of [172] people and companies and teachers teaching people to do things the right way, but every bushel has a few bad apples?

A That's true. That's not the case here in my opinion, but it is true.

Q You don't think there's any bad apples in State Farm?

A Oh, I think there's plenty of them. But I don't think it's just a few.

Q Now, did you read Mrs. Bird's testimony that it would hurt State Farm if she didn't act in good faith?

A I'll accept your representation, and I agree. If you don't act in good faith, you have to come to the jury.

Q And she acknowledged that even in the underlying case, if you don't handle a case properly you could lose the case, and that would cost the company more money than a settlement might cost?

A Again, I don't recall the testimony specifically.

Q And she also told her people that you have to handle cases in good faith, or it will cost the company more money.

A I believe she testified to that, something to [173] that effect.

Q And also she testified that she didn't think it would promote State Farm's best interest to cheat or low ball people; isn't that true?

A I'll accept that. But then she talked about how it was done. Training versus implementation.

Q And also Mr. Summers said in his testimony that he didn't think it was in State Farm's best interest in the Campbell case to change his evaluation.

A Yeah, he felt he was ordered to do it, and he didn't think that was in Mr. Campbell's best interests. That's my recollection.

Q So it really wouldn't be in State Farm's best interests to deceive Mr. Campbell, would it?

A I don't think it was, and I don't think they ever should have done it. But I think they did it.

Q And it wouldn't be in the company's best interest to refuse to settle a case that they knew they were going to lose.

A They do it, but I agree, it technically should not be in their best interest, it's not something they should do.

Q Now --

A But if they get away with it, you know, so maybe it does work for them.

[174] Q You don't have statistics on that, do you?

A Well, I know how State Farm handles claims, and I know that they're bully-like in terms of dealing with people.

Q You've got bully-like?

A Bully-like.

Q Now, that's actually what Mr. Garamendi said when he spoke about his reign as the insurance commissioner, that he would be a bully to the insurance companies; isn't that where you get that term?

A No, that's my own term. And Samantha Bird used it. She described Noxon as a bully several times. How he bullied her.

Q You haven't seen that in any State Farm documents, have you?

A To bully people? No, I haven't seen it in a document.

* * *

[177] * * *

Q Let's talk about the threat of losing his house. Isn't it a fact that Mr. Ospital and Mr. Slusher, the Ospital parents and Mr. Slusher, made an agreement before the trial against Mr. Campbell, that they would sue State Farm?

[178] A I recall generally there were some agreements entered into, which is typical in these kinds of cases.

Q It's in June of '83.

A Okay, the comments, and I'm not going to adopt the dates --

MR. HUMPHERYS: Hold on just a minute, may we approach the bench and discuss this?

THE COURT: You may.

* * *

(The jury left the courtroom.)

THE COURT: Let the record show the jury's left the courtroom. We'll be in recess for half an hour.

[179] MR. SCHULTZ: Can we make a record real quick?

THE COURT: You may.

MR. BELNAP: Last night when we were talking about the fact that evidence was not going to come in of the settlement in the Singh case, and counsel agreed they were not going to pursue that, I think we made it clear, but I just wanted to state for the record, we were not waiving our prior objection to the fact that the Poston case was talked about. We took that up with the court before that was gone into, and we still object to that.

And I think the record's clear, but I just wanted to make it clear that we're not waiving our objection to the fact that was brought up.

THE COURT: I think you raised it yesterday, and you were going to present the court with a proposed jury instruction that would go to that issue.

* * *

[184] * * *

Q (BY MR. CRANDALL) Mr. Prater, with some food in our stomachs, hopefully we can slow down a bit and give the reporter a chance to get our words.

Just before the lunch break, I was asking you about your awareness through the documentation of an agreement in June of 1983 between Mr. Ospital, or the Ospitals, and Mr. Slusher about suing State Farm if they got an excess verdict.

A Okay.

Q And you're aware of that?

A I have a general recollection of it.

Q We have this document already in evidence, and it's on June 3rd of 1983, between Robert Slusher, [185] Junior, and the estate of Todd Ospital and Allstate. And it said, it says in here that, "Ospital and the attorneys currently retained by Ospital shall assist Slusher in the prosecution of his claim against any other party responsible for said injuries and damages, including any claim for bad faith against any insurer of the responsible party." Do you see that?

A Yes.

Q So before the case went to verdict, which was September of '83, Ospitals and Slushers agreed that they would go together and sue State Farm for bad faith.

A Under certain circumstances. They agreed to settle as between each other, which is common, and under certain circumstances, to proceed further.

Q But the important thing is, you're aware, as a law professor, that Ospital and Slusher didn't have a direct right to sue State Farm.

A That's right. Not for the bad faith claim, that's right. Because it only runs to the Campbells.

Q So when Ospital and Slusher got excess verdicts against Mr. Campbell, they needed Mr. Campbell to be the party to bring the lawsuit.

A That's right, in his name it would have to be brought, as is typically the case.

Q And so based on this agreement that was [186] entered into before the trial, Ospital and Slusher needed Campbell's cooperation to sue State Farm.

A Well, Campbell had basically assigned his rights, in part, in the bad faith claim, and so they would cooperate with one another when and if that became a reality. That's very common.

Q That agreement wasn't entered into until December '83, January, '84?

A I don't recall the precise date.

Q That wasn't even signed until later?

A I don't remember it. Again, I don't focus on that.

Q My point is this. If Ospital and Slusher wanted to have a bad faith case against State Farm, and they knew they needed Campbell, isn't it true that they had no intention, even before the trial, to take Mr. Campbell's house away, because they wanted to join him in a lawsuit against the company?

MR. HUMPHERYS: Objection, Your Honor, the things discussed at the bar. We're now going into a new area.

MR. BELNAP: Judge, that doesn't violate --

THE COURT: I'll allow him to answer that question.

MR. CHRISTENSEN: Well, he's also asking him [187] to speak to someone else's intent. There's the Campbells and Slushers and Ospital, and their counsel all testified about what the intent was. And now we're asking an expert to comment on their intent. I don't think it's proper.

MR. HUMPHERYS: I think that's not proper.

THE COURT: He can state his understanding, and I'll limit it to that.

THE WITNESS: Go ahead and ask the question again, please. Or maybe I can have it reread.

MR. CRANDALL: I'll be glad to rephrase it, or try to restate is it.

THE WITNESS: Okay.

Q (BY MR. CRANDALL) As of June 3rd, 1983, isn't it true that Ospitals and Slusher did not intend to try to take any of Mr. Campbell's personal property away to satisfy a judgment, because they wanted to sue his insurance company, and they needed his cooperation to do that?

A I don't think I can comment, or provide an answer to that. I think, as suggested in the colloquy that has happened, I can't say. You know, I mean I know Mrs. Campbell felt that the agreements weren't worth a hill of beans. They still felt threatened. So it's only as good as the paper it's written on, and I'm not [188] going to get any further than that, because I don't want to talk about their intent.

Q Let me ask you this. You're aware, as an insurance professor, that if Campbell, I mean if Slusher and Ospital had this agreement, and they got the excess verdict, and they took away Mr. Campbell's house and he said, "You took my house, I'm not going to go in with you to sue State Farm," then Ospital and Slusher would have been out a lot.

A I can't say that. There's too many other factors that could come, be involved in laws unique to Utah. I really can't comment on it.

Q Under the law of Utah, you know they can't sue State Farm directly, don't you?

A I know that.

Q Thank you. We mentioned some statistics before the lunch break, and went on to another issue. So let me bring those up here.

To put us in context, this morning I asked you about your testimony that the company, through the PP&R process, is promoting claim representatives to reduce average paid cost of bodily injury claims?

A Right, we discussed that subject.

Q And you've seen PP&Rs from '84, '85, all the way through '94.

[189] A And beyond.

Q Okay. Now, isn't it true -- I'm going to show you the average paid cost for bodily injury claims statistics for State Farm that run from 1980 up until '94. Isn't it true, when you look at the average paid cost for bodily injury claims that --

MR. HUMPHERYS: Hold on just a minute. Your Honor, what we agreed to do, if there's been no foundation laid, and we haven't had an opportunity to check the figures, we agreed to allow him to say, "assuming these figures were true," and then to ask the questions, subject to verification and foundation being laid.

THE COURT: That's reasonable.

MR. HUMPHERYS: I'm objecting to his representations that they are correct, when we don't have that understanding yet.

MR. CRANDALL: And we'll be calling a witness in our case to lay the foundation.

THE WITNESS: Okay, assume that they're true, and assume that they have a foundation, and assume that they're honest.

Q (BY MR. CRANDALL) I want you to assume you're reading the transcript next week or the week after, and we've called someone who will say these are [190] the numbers.

A Can I further assume that they really are the numbers?

Q That these are really the numbers, that State Farm doesn't have somebody back at home office sitting back there, just making them up.

A Okay.

Q And I want you to further assume that insurance commissioners go out and audit insurance companies from time to time.

A A major leap of faith, but go ahead.

Q Okay. 1980, the average paid cost, which means what they settled a bodily injury claim for, was under $5,000.

A All right.

Q And that by 1994, it had risen to just over $11,000.

A Okay.

Q So apparently the PP&R recommendations to reduce average paid costs per file has not worked across the board for the company, has it?

A I don't agree with that. There's other factors that come into play, like inflation. I would expect to see, because of the increased costs of medical care and doctors, as we've all seen in the last ten [191] years, the numbers to creep up a little bit. Maybe they should have creeped up a lot, and the pressure worked to keep it down. And it was still, the people were underpaid and not treated fairly, because the training is to keep it down. And that might be a great accomplishment, you kept it down under inflation or something. See, that's why --

Q Have medical costs more than doubled since --

A Oh, absolutely.

Q More than doubled?

A Medical costs?

Q The advent of HMOs and medical management, they've leveled off.

A But the technology and hospitals having to have the equipment and CAT scans and the other things the last couple of years, have been better, but we were seeing 50 to 100 percent rate increases in the early eighties, commonly, because of the increased costs of medical care. I mean, again, let the statisticians talk about those numbers. But that was my recollection and experience.

Q And you would agree, in looking at this, that, in fact, State Farm is paying more than twice the cost of a bodily injury claim in 1994 than they did in 1980?

[192] A Based on your assumptions.

Q Thank you. And let's look at the expense side of that.

A Okay.

Q This document in this enlargement represents the average adjustment expense, which means how much State Farm has to pay to have claims adjusters, investigators, lawyers, or whatever it takes, to handle the claims.

A Okay.

Q Okay. And you can see that from 1980 through 1995, once again it went from somewhere around $1,200 to about $3,000 per bodily injury claim.

A Okay.

Q And again, if the PP&R suggested that we want you to keep down expenses, the company, as a general rule, has been unsuccessful over the course of this time.

A They may still have kept down expenses, but there is an inflationary trend, as I would expect.

Q Now, do you know the rate of inflation over the last fifteen years?

A It's varied from year to year, but it's low. Again, that's something that's related to -- Inflation in certain areas, medical fields and in other fields, [193] but I think that's better left to the statisticians, not to me.

Q In fact, State Farm is paying more for bodily injury claims, and more to adjust those claims over the years, in spite of what some isolated PP&R says; isn't that true?

A According to those charts.

Q Another criticism you had is State Farm's plan for collision coverage to have allowances to leave some dents, called an appearance allowance?

A A lot of people -- I have opinions on it. I've read testimony, but I don't believe I talked about it myself much on direct.

Q Isn't it a fact -- Let me have you look at the statistics, that over the last fifteen years, the average paid cost for State Farm to handle collision claims has more than doubled, from $800 in 1980 to over $1,600 in 1994.

A Same assumptions. You said, "Isn't it a fact?" But we're using the same assumed fact.

Q Assuming that someone's going to come in from State Farm who will make a credible witness and say, "These are the true facts," and the person isn't a big fat liar --

MR. CHRISTENSEN: Can we ask who this person [194] is? Because this is new to us. Who is going to be this witness?

MR. BELNAP: What do you mean, it's new? There's Joe Eschelman, there's reports we've given.

MR. CHRISTENSEN: As far as who's going to testify to these charts.

MR. BELNAP: Joe Eschelman.

MR. HUMPHERYS: Joe Eschelman testified as to the BI lawsuit reports. I don't recall him testifying about these. But that's who you're planning on using?

MR. BELNAP: If that becomes necessary. We've given you the auto administrative report, the GCMs, the BI lawsuit reports.

MR. HUMPHERYS: We'll address this after the matter.

THE COURT: Thank you.

THE WITNESS: I can read the numbers and read the charts, and that's all I can do.

Q (BY MR. CRANDALL) They're increasing.

A Right.

Q So if State Farm had a great conspiracy to cheat the public out of paying to get their cars repaired, it's been a failure?

A I don't agree with that. I won't agree with that at all. The charts are the charts, and --

[195] Q So you think it's great, State Farm is now paying twice as much to fix a car as they used to pay.

A I think it's great? I don't have a opinion that it's great.

Q Is that good for State Farm?

A I don't have an opinion response to that question.

Q And you don't have any opinion that these are inconsistent with industry averages, do you?

A I don't know. I haven't seen the other industry statistics.

Q So what you're saying is, you've come in here to tell the jury that it's unfair for State Farm to have cost containment measures, but you haven't analyzed the effectiveness of cost containment measures?

A That's not what I'm saying. It is okay to have good cost containment measures. It's the ones they've adopted and implemented and trained people in, are not proper. The ones I've talked about. There are some proper ones, but there are a lot of them that are not.

Q Let's look at the other side of the collision claims ledger, and that is the expenses of handling collision claims.

A Okay.

[196] Q So in addition to the actual costs of collision claims going up, the expenses in adjusting has also gone up?

A Sure, people's salaries go up, I hope. I mean that's going to naturally have a little trend to go up. There can still

be pressure to keep it down using unreasonable methods and being unfair, and it's still going to have a natural tendency to creep up. People's salaries go up.

Q Have you seen charts regarding insurance premiums?

A I have in the past. I'm sure in trade periodicals that I subscribe to, yeah.

Q And probably in your own checkbook?

A Probably.

Q So, in fact, the amount that the average amount paid for bodily injury claims and the average amount paid for collision claims has increased, as well as the amount paid to adjust bodily injury claims and the amount paid to adjust collision claims?

A According to your charts, yes. And I would expect a certain increase.

Q Now, one major component of a personal injury, or bodily injury claim is pain and suffering.

A Yes.

[197] Q And in your opinion, does the value of pain and suffering have anything to do with the inflation rate, or the cost of living rate?

A Probably not.

Q So although we may have inflation or cost of living, you wouldn't expect the value of settlements in whiplash cases to follow that track, would you?

A The valuation in whiplash cases to follow what track?

Q The track of the cost of living increase?

A Well --

Q Or the inflation increase?

A But you don't get much pain and suffering in whiplash cases. I mean you get something, but it's not a lot. You know, if I understand your question correctly.

Q So if I understand your testimony correctly, you have told us that State Farm has some serious problems with their practices and procedures, but you haven't correlated that to the actual numbers that are paid out to the public.

A I have seen enough information that I don't need the statistical information to reach my conclusions. The statistical information can be manipulated, and we don't know what it's based on.

[198] And as already indicated, the statistics that show 98 percent of the cases settle, my question is, how long, how much wasn't there? They won't produce that. Where's the delay column in the report? Where's the reserve information that tells me what State Farm thought the case was worth, and how much they paid to settle it? People don't want to fight State Farm. They settle for less than they're entitled to because they cannot fight. And that is wrong.

Q Isn't it true that, in fact, people can get lawyers to sue State Farm on a contingency fee?

A They can, but a lot of lawyers get worn down, especially in the small cases. They can't hire the experts that State Farm hires, they can't hire firms like your firm. They cannot spend the money on the small cases, so they cave in and take less than they want to. And State Farm knows that, and they take advantage.

Q Were you lying this morning when you told this jury about all these lawsuits against State Farm all across the country?

A No.

Q In fact, there's a lot of cases against State Farm, aren't there?

A That's true.

[199] Q And there's lots of cases against lots of insurance companies?

A Right.

Q And there's lots of lawyers who will take cases on a contingency fee?

A That's the standard way to do it. We were talking about bodily injury lawsuits a minute ago, then you switched it into the punitive damages lawsuits. Very different.

Q So if a person thinks they've been cheated by State Farm, they can go get a lawyer for no money down?

A Assuming the lawyer has the money to fight.

Q On contingency fee, and sue State Farm?

A If the lawyer has the money and the willpower to fight, and fight State Farm and its legion of lawyers for years, and State Farm's resources, then yes. A lot of people don't. They cave in. The lawyers cave in. I've seen it again and again. And the insureds cave in.

State Farm offers them fifty cents on the dollar and says, "We're going to drag you through courts, we're going to do the mad dog litigation, we're going to," you know, like in the training seminar, "keep you in discovery, tied up forever and ever."

Q The fact is, that's a big lie. What's really true is there's a legion of lawyers out there who know [200] that they can bury State Farm in State Farm's own documents by sending out requests for every document the company has in their possession, and hope that, rather than spend $300,000 copying a bunch of documents that have nothing to do with the case, the company will pay them some ransom to get out of court. Isn't that what really happens in our community?

A No, it's not.

Q Isn't that what's happening across the country?

A No.

Q Isn't it true that these class action lawsuits are not filed by a group of people, but they're filed by a few greedy lawyers who file the lawsuit and hope they can put the people together later?

A No, I don't agree with you.

Q It happens, doesn't it?

A It may happen, but that's not what I've seen. I see other things, sir.

Q Let's talk about --

A I've talked about those.

Q Let's talk about the BI Proficiency Program. Do you have a copy of that?

A I have that memo, I have other documents and references to it.

[201] Q And again, this is another document that reflected, in your opinion, a bad attitude by State Farm, and a desire to cheat the public?

A It's only a piece of a puzzle, it's a portion. The Bodily Injury Proficiency Program has many components to it, some are good, some are not. Some good things can be used for bad purposes, as we've seen. We've had testimony on it.

Q And some good things can be twisted to seem to be something that it's not.

A I suppose that's possible.

Q Let's take a look at this.

A Okay.

Q It talks about -- And by the way, for the record, and for counsel, excuse me, we're talking about GCM, general claims memo number 456, and it's dated March 6th, 1992.

A Okay.

Q And it's to all the regional vice presidents and deputy regional vice presidents, and a bunch of management people.

A Yeah.

Q And also the general claims staff.

A Uh-huh.

Q So apparently it went out to all the 30,000 [202] people in claims. And it says in here that, "The objectives of this program are to," and listed there is, "Increase understanding of our respective roles in providing the best possible service to our policy holders and the public."

A Sounds good.

Q "To eliminate internal work flow delays, and encourage reporting assignment and disposition of claims."

A Uh-huh.

Q And you'll admit, won't you, that in fact, at State Farm, like any other big company with 30,000 employees, there's going to be some internal work flow delays.

A Sure.

Q And another objective is to promote agency/claims service accountability.

A Yes.

Q And that's where the agents, by the way, who sell the insurance, want to make sure the people renew, so they want claims to be accountable to the agents, that they took care of the customers.

A If you say so.

Q Thanks. And then another objective was to improve the quality of the claim file product.

[203] A Uh-huh.

Q Is that correct?

A That's what it says.

Q Okay. And on the back, next page, they had reporting and investigation goals, and they say that, "New claims reviewed electronically within two hours after it is routed to the claim representative."

A Yes.

Q They wanted same-day contact with the BI claimant, or an insured with a UM or UIM claim.

A Right.

Q So that's a first-party thing?

A Yes.

Q If the insured has an accident, get hurt by an under insured motorist or an uninsured motorist, they want the adjuster to talk with that person within twenty-four hours.

A Correct.

Q And they also have a goal of face-to-face contact within five calendar days.

A Yeah.

Q Now, you'll agree that in a service-oriented industry such as insurance, those are honorable goals?

A If they're carried out in an honorable way, which is not what the evidence indicates, based on what [204] I've reviewed. They have a sinister ulterior motive for that.

Q And the sinister ulterior motive is to get out there, face-to-face, and cheat people out of their money?

A To get them out of getting a lawyer, to control them, settle cases. You see it again and again. One of my friends was a State Farm insured, they called him. "My neck hurts." They wanted to give him a check right now, before it would manifest itself. It's the typical way they do it across the country.

Q Have you received the Rand Company, or the Rand Institute think tank study regarding how much people actually get in their pocket when they settle directly with insurance company, or when they have a lawyer settle for them?

A I have not seen it.

Q Would you be surprised to find it out that they do get more money if they have a lawyer for their claim, but they end up with less net in their pocket?

A I'd have to see the study. I don't want to comment on it if I haven't seen it or studied it. I know the basis of it.

Q One other item in here.

A I did see a study though in the BI program, [205] done on this, which talks about it as being attorney, first contact, controlling people getting attorneys. That was done on State Farm's own program.

Q Do you think there is any doubt that State Farm, like every other insurance company, would rather settle their cases with people directly, than with lawyers?

A Well, if they can do it cheaper and save money. But it doesn't mean it's fair. It doesn't mean it's the right thing. I mean if it's fair and it's right, and you're telling people their rights, and you're entitled to more, and "Let's wait a little bit to see if the neck gets better before I try and get a release," I don't have a problem with that. I don't have a problem with prompt contact, going out and seeing people face to face and talking to them fairly about what their rights are, and telling them what their coverage rights are.

Q And just because a person has a lawyer, that doesn't mean the amount of money that lawyer gets for the claim is the fair value, either?

A That's true.

Q It could be unfair without a lawyer, it could be unfair with a lawyer?

A It could be. But lawyers are better able to [206] evaluate. The lay people don't know all they're entitled to, and State Farm knows that and takes advantage of that.

Q And lawyers may build up cases and make them unreasonably expensive to settle, so that it could be, in fact, unfair to the insurance-purchasing public who have to end up paying for the premiums?

A Some lawyers do that, I agree.

Q One other item of the procedures is that each claim representative or backup will review the claim and start working the file within a two-hour time frame.

A Uh-huh.

Q Now, that's not a sinister plot, is it?

A No, not on its face.

Q So like the other State Farm documents, on their face they have fair, reasonable, and honorable goals?

A Many of them do, yes.

Q Earlier today, you mentioned that you researched a number of cases for this West Virginia case.

A I didn't do it. It was done by somebody else.

Q Okay.

A That was the testimony. But go ahead.

[207] Q And they found a number of cases where State Farm was a party, that allegedly involved State Farm being charged with bad faith or some wrongful conduct.

A Or verdicts, or Court of Appeal judgments, affirmed in verdicts. There was a mixture of things. I have the stack, quite high, of them.

Q Did you read all those cases?

A I did. I read most of them, if not all of them.

Q And some of these cases, as you said, were trial court cases, and you don't know what happened to them on appeal.

A I think, my recollection is some were affirmed, a few were reversed. I mean it was a mixture.

Q And the mixture includes no-fault cases, where somebody sued to say, "I got $1,000, I deserved $1,500."

A There may have been some. I don't remember. My understanding is we're not supposed to talk about the numbers or the values on any of these cases.

Q But some of them were not national scale bad faith punitive damage cases.

A No, that's right.

Q Most of them were local, small cases?

A I don't know if you could say most of them, [208] but some of them. Some of them were big cases.

Q Let me ask you this. You considered all the trial testimony up to this date?

A Yes, sir.

Q And you've considered all the deposition testimony.

A I have.

Q And did you consider the trial testimony of Samantha Bird?

A I did.

Q And you recall she testified that she was never taught to downplay or minimize somebody's bodily injury.

A I think we talked about that earlier.

Q And you believe her, don't you?

A I believe she believes that. And I have no reason to believe she's not telling the truth based on how she perceives it.

Q Did you read the opening statement, where the plaintiff's attorneys indicated she was honest?

A I have no reason to believe she's not being honest. Based on what she believes to be true and what she knows and understands. She doesn't believe she ever did anything bad, but then she talks about a lot of things she did that were bad, but she doesn't appreciate [209] it, perhaps. That's the way she was trained.

Q And she's a perceptive person?

A I have no reason to believe otherwise.

Q If she was being trained to lie and cheat and steal, you'd think she'd have recognized it?

A Well, there's different degrees. And she would certainly recognize the blatant stuff like she talked about from her superior, who was her chief trainer, Mr. Noxon. I understand he's still with the company. And I have no reason to believe she didn't express the truth as she felt it.

Q Okay, thank you. Now, let's digress here and talk about the facts in Campbell.

A Okay.

Q You know that Mr. Slusher's claim was settled by Allstate?

A Well, yeah, they paid some money to settle that.

Q And did you try to analyze that case to figure out what the value of this case was?

A Did I try and analyze it? I looked at the case and I knew it was an excess of limits case, in my opinion, very quickly. I didn't need to come up with a range. This is a case where State Farm's limits should have come into play. And the fact that Allstate paid [210] worked out to State Farm's advantage, they got a credit.

Q But by the way, you said the verdict was low.

A It was low. It was lower than I would have expected it to be, but it was still in excess of limits, which is the only question.

Q What was the verdict for Mr. Slusher?

A I can look at it, it was a couple hundred thousand dollars, as I recall.

Q So, in fact, it was in excess of State Farm's policy and Allstate's policy; isn't that true?

A Assuming that the policy -- Yeah, I think it was.

Q And you were aware that 1 percent, at the time, means total liability under joint and several liability.

A At the time in Utah that was the law, that's right.

Q So Allstate looking at this case would have known that if they were 1 percent at fault, if Mr. Ospital was 1 percent at fault, then he would be liable for all of Mr. Slusher's injuries?

A Potentially. But that's not the way it worked out. We know Mr. Campbell was 100 percent at fault, so they paid money they really shouldn't have had to.

[211] Q But at the time they analyzed it, they analyzed it as a liability case, because you saw the transmittal case?

A And they effectuated a settlement promptly, as they should do. And they settled it for less than their limits, and it was acceptable. It was done.

Q Shouldn't have Allstate have offered the policy limits, because the same exposure was facing Allstate that had faced State Farm, but, in fact, Allstate settled for $65,000? Is it your opinion that Mr. Humpherys low balled Mr. Slusher?

A No, they effectuated a settlement, it was acceptable for both parties, represented by attorneys. Allstate ponied up the money. As it turns out, they overpaid, because they didn't owe a dime. And it worked to State Farm's benefit. State Farm is the one that wouldn't offer a dime, and they had the whole exposure.

Q Let's go through that again.

A Okay.

Q In fact, at the time Allstate sent this file to Mr. Humpherys, the transmittal letter says they considered it to be a case of liability on behalf of their insured, at least contribution.

A Right. The guy had testified in this trial, didn't he?

[212] Q Yes.

A About why he saw some preliminary stuff, and he worked out a settlement, and he protected the insured and settled. That was good.

Q At the time he saw that, they had joint and several liability. And if Mr. Ospital was 1 percent at fault, he could potentially have been responsible for 100 percent.

A Right. They recognized it and settled it.

Q Well, if they recognized it, and they recognized the exposure, they had the same facts State Farm had regarding injuries. Didn't they have the same duty to recognize it as a policy limits case?

A I think he said it, he recognized the damages would go way beyond the limits, and he just effectuated a settlement. And the important thing there is, what he did was, he

effectuated a settlement that was acceptable to the parties, and he got a release for the insured. That's what the insurance company's supposed to do. Settle the case, keep it out of trial, and that's what Allstate did.

Q And this is the settlement, the June 3rd, 1983 settlement.

A Okay.

Q And there's two parts of consideration. [213] Allstate will pay sixty-five, and then they'll go together and sue State Farm.

A Because State Farm wouldn't offer a dime. That's why they had to enter into those kinds of agreements, because they wouldn't offer any money.

Q So in your opinion, State Farm had a duty from day one to recognize it as a liability case and pay the policy. But for Allstate, even though they recognized it as a liability case, they didn't have a duty to pay the policy limits? Is that your opinion?

A They worked out a deal and protected their insured. I had no complaint about what Allstate did in this case. That's why they're not on trial.

* * *

Q Let me talk about the insurance commissioners. Do you have your insurance commissioner documents there?

A I have lots of documents. I'm trying to find my trigger notes, and will find those, and if I need [214] something else I'll grab it.

Q And while you're looking for those, let's talk about trigger notes and witness preparation. You didn't like the, what was it, the divisional claims superintendent conference in 1986, because it talked about preparing witnesses?

A There was a lot of things that I had concerns about, and I think we discussed that. And again, it had to do more

with trying to shade the truth in connection with the handling of files, and hide things, and coach people on their answers, and have them look at documents and create memories for them and that kind of stuff. We talked about that.

Q But, in fact, you heard Mr. Humpherys yesterday, when talking about how quickly you speak, that he and you had met the night before to go over this case.

A I gave him my notes. Of course we discussed certain things, and I don't have a problem with certain witness preparation. I personally am not somebody who needs a lot of preparation. I prepare my notes and give them to counsel.

Q You have a lot of problems with State Farm, but when I bring up you're also involved in that type of activity, you don't have a problem with it in general.

[215] A You're comparing different concepts. I also don't have a problem with State Farm helping witnesses to be familiar with what the courtroom's like, how it's laid out, that kind of stuff. A lot of lay people need that kind of information. Because it's a very uncomfortable place for them to be.

Q But you met for an hour last night, or the night before, with Mr. Humpherys?

A Sure. Yeah.

Q And you went over documents?

A I don't know that I went over any documents.

Q You gave him your notes?

A I gave you my notes. I've given everybody my notes.

Q Did you give him your notes the other night?

A I may have. I don't remember if it was the other night, but I've given them.

Q And what are you calling those?

A They're just trigger notes, to trigger thoughts in my mind. I have to have some way to focus myself. You see, you get the advantage, you get to know what all my opinions are, because you've taken my deposition. I don't know what you're going to ask me because --

Q You've been in more of these trials than I [216] have, haven't you?

A I don't think that's possible. But I'm saying, I've got a lot of documents in the back of the room. I have to be prepared to jump quick and find them. That's what these are to help me with.

Q Generally it's okay to help witnesses understand the witness cross examination process.

A Sure, and not to shade the truth.

Q And you haven't seen any documents where somebody at State Farm has said, "We expect you to lie for the company when you testify in court."

A Not in those words, no.

Q Let's get back, I was talking about the insurance commissioners. You were talking earlier today about the big companies not having any significant fines.

A Right. With the exception of a few, that's right.

Q Okay. Now, one of the biggest in the world is a group called AIG?

A Yes.

Q And that's American Insurance Group?

A Correct.

Q And I'd like to show you an article where Garamendi assessed AIG $750,000 fine that was settled. [217] It's a headline, it's a press release.

A Yeah.

Q And the headline is, "Garamendi Assesses AIG Group $750,000 for rate and underwriting violations. Payment is second largest in department history"?

A Right. It's still a drop in the bucket to AIG.

Q But they're a big company?

A They're a huge company, and $750,000 is like probably one day's net worth. They're almost as big as State Farm.

Q So your testimony --

A They're huge.

Q -- again, this morning, that there's been no fines against the big companies was wrong?

A That's not what I said, counsel. I said there had been very few and far between. I've studied the data back ten years, I've gotten the reports that are available to the public, and my testimony is very clear that the departments of insurance across the country and in these particular states don't take action against the big companies. They don't assess big fines. $100,000 in ten years against State Farm.

Q Let's talk about the insurance commissioners.

A Okay.

[218] Q Mr. Yancey got a group of guys together from the insurance commissioners association and made an agreement that they would lie for State Farm?

A Mr. Yancey called them all, right after Mr. Hanni asked him to call some of his friends and have them come and testify in this trial for State Farm. They came, knowing nothing, basically --

Q The question is, do you think he made an arrangement with them to lie for State Farm?

A I won't go so far as to say he made an arrangement to lie. I look at them more like shills. They're the decoys, again, they're the people cloaked with the power. They're going to come in and say State Farm did good things. That is offensive to me.

Q Do you think it's offensive to call people liars, and question their integrity, when you don't know them and you haven't talked to them?

A I will not call them liars. I will not.

Q And it's not offensive to call someone who has reached the highest position in the state in their department a shil? You think that's not offensive?

A I think the jury can listen to what they have to say, they'll be subject to cross examination, and they can decide, you know, what weight, if any, to give to my testimony and to the commissioners. And I think [219] that's the best way to leave it.

Q You've never met any of them?

A No.

Q Never talked personally with any of them?

A I've read their newsletters, I've read their comments, I've read their depositions, I've read the basis for their opinions. It surprises me, I'm shocked at some of the opinions they've reached with no reasonable basis. This is the police department. And not only will they not police State Farm, but they'll come in to court and testify for them. That bothers me. That's just a personal opinion.

Q In fact, in Utah, Mr. Ovard not only polices State Farm, but required State Farm to submit a report to him regarding this very case.

A That's -- I looked at those documents, and apparently somebody read it in the newspaper at the department and sent a letter, and a simple letter came back. They never contacted the Campbells, they never contacted the lawyers, they never looked at any of the documents. It's a perfect example of what they don't do.

Q But you said they didn't do any investigation, and, in fact, the evidence shows they, in fact, required State Farm to come and answer, didn't [220] they?

A Maybe we should look at the answer that State Farm sent. Maybe that would be helpful. And we'll see how deep the investigation was.

Q In fact, we intend to put it into evidence.

A Good.

Q Now, let me also ask you, the insurance commissioners, they're a member of a national association.

A They are.

Q As are the fire chiefs.

A I don't know about the fire chiefs. I know about the insurance commissioners.

Q Well, there's a national association of fire chiefs, police chiefs, teachers, principals.

A I know about teachers.

Q Lawyers?

A I don't belong to any of them, but I'll trust your word on it.

Q Now, you indicated that one reason you're critical of these insurance commissioners is because they're political hacks, and they're appointed by the governor?

A Not true. I'm not critical of them as individuals. Bottom line, I don't feel they have the [221] resources, the manpower, the detailed knowledge to police or comment on the absence of State Farm's practices, when they admit in their depos that they've never even heard of a single case when State Farm did anything wrong. That's hard to me to put stock on when I look at all the stuff.

They've never seen any manuals, they don't know any verdicts. Now, I hope they come in here and stand by their testimony when they talk to this jury, and they won't come in and have been spoon fed more stuff to have more reasons for their opinions. I hope that doesn't happen. Because I've done my work, and I'm here today. They had opinions, they were very strong, and I hope they can stand by them and support them.

Q But statistics that you've never seen --

A Well, let's see what they have to support them.

Q Now, let's talk about the lack of financing and manpower.

A Okay.

Q In fact, as a Californian, you're aware that the California department of insurance is extremely powerful?

A That there are four departments, and I've testified many times --

[222] Q I'm asking about California.

A Yeah, California is. It's the biggest insurance state, so there's more money there than anywhere.

Q But it's the biggest everything state, isn't it? You've got more people?

A Probably.

Q More cars.

A I don't know. Maybe. I would think so, yeah, it makes sense.

Q It makes sense that they're the biggest insurance department?

A Texas is the biggest, I think, in land.

Q Alaska.

A Alaska, okay, thanks.

Q And you know that in 1990 the department of insurance became a separate independent department in the state?

A Oh, I don't know about the corporate formalities. They've been there ever since I've been there, the department of insurance.

Q And you're aware that under the laws that govern the department of insurance, that every three years domestic insurers are examined, and the department of insurance goes out and does a field audit.

[223] A Okay, I'll accept your representation.

Q So --

A Are you saying -- That's not been my experience. And what do you mean by a field audit, and how extensive is it,

and what is the purpose of it? I mean, I don't think you should be misleading in that, because my sense has been that it's a scratch-the-surface, if anything. It's a, "Hi, can we make an appointment?" Come out, knock on the door. And to me --

Q You've never been in involved in a field audit?

A I've talked to people that have been involved in them with the department of California. I talk to lawyers there all the time.

Q Isn't it a fact that in California, especially under Mr. Garamendi, they don't make a phone call, they just show up and say, "We want to see some of your files"?

A They have the power to do that, and Garamendi's the only guy that was doing it. And I know ex-commissioners that are very good friends of mine --

Q And Garamendi was the commissioner in the last four years, wasn't he?

A He was commissioner for four years.

[224] Q And, in fact, in California, the department of insurance has its own legal division to enforce compliance with the California insurance code.

A That's right. And they've hired me as their expert and talked to me about their frustration about it.

Q And, in fact, the case that they've hired you for is against some substandard writer from Ohio?

A That's right.

Q They haven't asked you to file some claim against State Farm, have they?

A They don't file claims against State Farm. The only one -- That's the first one, that Ohio one is the first one even our department has done in a long time.

Q In fact, they also have their own policy service bureau, don't they, under insurance code 12921.3?

A Probably.

Q And under this section, the employees of the department receive and investigate complaints of alleged misconduct by the insurer, and in particular where the insurer is paying the amounts due under the policy?

A That's right. Whether it happens or not is another question, and I said that earlier. California's [225] gotten a lot better on investigation since we did get an elected commissioner, but it still falls woefully short of what needs to be done.

Q They have a consumer affairs division which, in particular, reviews the insurance companies' requirements under the Unfair Claims Practices Act?

A But they have no power. They have no power to sue, they won't represent people when they have problems, they tell them to go get lawyers. They do hearings, at best, and they don't assess fines. It's supervision by benign neglect. They've been called a toothless watch dog, and I agree with that.

Q So Allstate, hit with a million five hundred $1,530,000 fine, AIG hit with a $750,000 fine --

A Those are exceptions.

Q That's not power?

A Those are exceptions? Those are drops in the bucket. That kind of a fine doesn't deter a multi-billion-dollar company. That's not enough to get their attention.

Q You are aware that after the Oakland fire Mr. Garamendi appeared personally at a seminar and heard a number of speakers, one of which was Ina DeLong?

A You've represented that, and I was not there.

Q Now, how much is the budget for the [226] department of insurance in the state of California?

A I don't know, but we're sure it's the biggest in the country.

Q Do you think they kind of spend five or ten million dollars?

A Beg your pardon?

Q Do you think they get five or ten million dollars to insurance?

A Do I think they only have --

Q Do you think they get that much?

A I haven't looked at the numbers. I know whatever it is, it's not enough, and it's not being done.

Q How about $354,929,000 for the budget for the department of insurance in California?

A They have a lot of work to do. A lot of -- There's a lot of staff, lawyers. Like you say, it's a heavily regulated state. It doesn't mean it all goes into unfair claims practices act policing, because it clearly doesn't.

Q In fact, the number of employees they have is 115 --

A Okay.

Q -- employees?

A That's big. I told you it was the biggest [227] one. It's bigger than all the rest of them combined.

Q So even though they have 115 employees and $354 million, they didn't have sufficient assets to go after State Farm on Ina DeLong's complaints.

A I don't know that they didn't go after State Farm. You waited for Ina to leave to bring this up, and I think that's a little unfair. She and Garamendi were very critical of State Farm, including Garamendi. And he's in Washington now, maybe we can get him to come here. I don't think so. But I think that's something Ina is better prepared to talk about.

Q We have a video tape, would you like to see his video tape?

A There's been objections to the video tape, and I'm sure it's only a part of it, if you want me to see it. But I think Ina was in a position to talk about it, and you keep her from talking about fire cases, and I come and you want to talk about fire cases, and I've studied auto cases.

Q May I ask you, where there's only part of the video tape, if you want to see it?

A I saw the video tape.

MR. HUMPHERYS: Your Honor, I object. The court has ruled that this can't come in, and to sit and argue about the video tape is just a waste of time.

[228] MR. BELNAP: Your Honor, there hasn't been a ruling on the video tape.

THE COURT: Yeah, there has been. The ruling was that you're not going to show it if it hasn't been disclosed to counsel, given a chance to review it, like other video tapes.

Q (BY MR. CRANDALL) You had Ina DeLong's testimony?

A I did.

Q In fact, she admitted that she gave all of her documents to State Farm, I'm sorry, she gave all of her documents about State Farm to the insurance commissioner, and they haven't done anything about it.

A I'm not surprised.

MR. HUMPHERYS: Your Honor, this has been -- I object on repetition. This has been covered at least three times before.

THE COURT: Sustained. Let's move on.

Q (BY MR. CRANDALL) So as I understand your opinion, even though the claim operation reviews that you pointed out were bad because they had the wrong goals on them --

A Some of them.

Q They were all from California, weren't they?

A Those were the only ones that we've ever been [229] able to get our hands on, because the judge in Singh ordered you to produce them. That's not true, I have the Utah one, too.

Q But the ones you talked about this morning, or yesterday, were, in fact, from the Sierra Pacific Region, northern California, Mojave East Region, southern California, and one from the bay area.

A West Lake Region, that includes Hawaii.

Q But that's, in fact, the person who is in southern California, wasn't it?

A Well, the head honcho's in southern California, or he was. But it's still the Hawaii state regions. Some of the regions are multistate. Plus I found the one in Utah that I had to get from Washington, because you guys wouldn't produce it here. So I've got one from Utah.

Q But my point is, we've established you have all these bad documents from State Farm. Ina DeLong has all these bad documents from State Farm. The insurance commissioner in the state of California has said he's going to make his reign the insurance companies' worst nightmare?

A He's no longer there.

Q He said that. Ina DeLong gave him all those documents, and yet no action's been taken. Isn't that [230] true?

A It doesn't surprise me, and he's no longer there. A new commissioner was appointed with the industry's money.

Q And, in fact, the new commissioner was elected by the people?

A He was elected by the people, heavily funded, millions of dollars, by the insurance industry.

Q How was Mr. Garamendi elected?

A I think he got it from a cross section, as I recall.

Q So all of the sudden the insurance employees are all out to vote?

A No, I have a lot of good friends at the department, and they do what they can. That's important. You know, it's

a big job, and they do a lot of things. And they do what they can. A lot of them are good people, but they do not police unfair claims practices violations.

Q Isn't that improper for you, as an insurance person, to have a good friend at the insurance department?

A Absolutely not.

Q It's okay for you, but if somebody at State Farm wants to develop a relationship with the insurance [231] department, that's a bad thing, isn't it?

A Did I say that? I don't think I said that at all.

Q That's what you said.

A I said that's okay if they want to develop good relationships for good reasons with people at the department. That's what I talked about earlier today. I don't have any problem with State Farm people wanting to meet people at the department of insurance. It just shows that there's a close relationship. That's all it shows.

Q In talking about the insurance department, you cited some language from the case of Moradi-Shalal versus Fireman's Fund.

A Correct.

Q I'd like to refer you to other parts of that case.

A Okay.

MR. BELNAP: Your Honor, while he's looking for that, can we approach the bench?

(Side bar conference held out of the hearing of the jury.)

Q (BY MR. CRANDALL) Have you given all those documents to the insurance department?

A Have I given all those documents to an [232] insurance department? Answer, no. Will State Farm allow me to do that?

Q Moradi-Shalal is the case where you cited yesterday, the jury, to some excerpts from the dissent.

A Correct.

Q Now, for those in the court who aren't lawyers, would you explain what a dissent is? Is that the people who don't vote for the majority opinion that's law?

A There's a majority opinion, and then people dissent, or feel strongly, the justices on the court don't agree with the majority, then they write an opinion and they say why.

Q And so the information that you showed the jury was from the minority opinion that didn't become the law of the case.

A Well, none of this became the law of the case. I mean the dicta is not the law of the case. It was a very strong comment as to why the dissenting justices didn't agree with the law of the case. And that's dictum. You know that's something different.

Q Now, in Moradi-Shalal versus Fireman's Fund, it was a case where, a third-party accident like this --

A Correct.

Q -- happened, and Mr. Moradi-Shalal sued an [233] insured who was insured by Fireman's Fund?

A Right.

Q And they settled the case?

A I'll take your word for it.

Q And then Mr. Moradi-Shalal turned around and sued Fireman's Fund and said, "You didn't comply"?

A With the unfair claims practices.

Q The Unfair Claims Practices Act. I'm suing you because California used to allow people to sue the other person's company for bad faith?

A Royal Globe versus Superior Court, which is the previous Supreme Court opinion where a third party can sue for a violation.

Q And that was written by Roseberg, who was recalled?

A And others. It was joined by everybody else at the time. Maybe two dissenters, as I recall.

Q Who of the other justices who got recalled wrote it?

A There were several others. Some who didn't get recalled.

Q This case goes up on appeal, and it finally got to the Supreme Court?

A Yes.

Q And let's take a look at what the Supreme [234] Court said, the majority opinion.

A Okay.

Q And in fact, on page 298, just to put us in context, it's Moradi-Shalal versus Fireman's Fund in August of 1988. Their subsection B, here, talks about scholarly criticism. And it says, "Commentary on Royal Globe," and that's the case that allowed third parties, like Mr. Slusher or Ospital, to sue the other person's company?

A Right.

Q Have been generally critical of that decision.

A Right.

Q And I noticed one of those criticisms comes from a highly regarded law school, Santa Clara Law Review.

A Right.

Q Did you write that?

A I didn't write that one, no.

Q You read that one?

A I've read lots of them.

Q Have you read that one?

A No, I don't think so. I may have. I read lots of stuff in Moradi-Shalal and Royal Globe, I have a real good feel for it.

[235] Q Anyway, there was criticism in that case allowing those direct action lawsuits, in the law journals?

A Right, because the commissioner said they would handle it. That's why.

Q And then the court went on to say what the criticism is.

A Uh-huh.

Q And as you see, in paragraph 2, it says, "These articles emphasize both the erroneous nature of our holding," "our holding," meaning our Supreme Court's previous holding?

A Right, in Royal Globe.

Q "And the undesirable social and economic effects of the decision, i.e. multiple litigation, unwarranted bad faith claims, coercive settlements, excessive jury awards, and escalating insurance, legal, and other transaction costs."

A Right, that's part of what the case says.

Q In other words, what the Supreme Court is saying here, in reviewing this, we find out what happened was, since third parties could sue insurance companies for not settling quick enough, a lawyer would file a lawsuit and then tell the insurance company, "You'd better give me a bag of cash next Tuesday by noon [236] or I'm going to sue you for bad faith when the case is over."

A Right. That's not the way it really worked, though, but lawyers would say whatever they would say.

Q They would make a settlement demand with a time limit, and if the company didn't comply, they'd then sue them for bad faith after the case was over?

A Right, that would happen in some cases. But that's not the reason for the holding. Again, that's dicta. The holding -- Would you like to discuss the holding and why?

Q I'd be glad to. I think we're getting to it.

A Okay.

Q The court goes on about --

MR. CHRISTENSEN: Your Honor, I'm going to object to this. This is an interesting discussion between two California lawyers about California law. I simply used the

case as an indication of facts that were contained in the case of the lack of action by the insurance commission. We're not debating whether the law in California should be the Royal Globe case or the Moradi-Shalal case. And I think it's a non-issue in this case.

THE COURT: Where are you going with it, counsel?

[237] MR. CRANDALL: I'm talking about insurance commissioners right here, and I think when he talked about this case, he criticized the case, and I think I have a right to show it was a valid case.

THE COURT: Well, you remember that the criticism was not of the case, but it was an attempt to elicit some information about the commissioners' regulation of unfair claims practices, and that was what the dissenting opinion held.

So it seems to me the scope of your cross examination should go to that issue, and not something that's wider, that goes to policy issues, or into the law. So if that's where you're going, that's fine. But if you're going to be debating social or insurance policy of California, I think it's really a waste of this jury's time.

MR. CRANDALL: And not even interesting to a Utah jury. So I'll get to the point.

THE COURT: That may be true.

Q (BY MR. CRANDALL) Part of this is the report of the National Association of Insurance Commissioners.

A Right.

Q So although the dissent said that they investigated what had gone on, the fact there was a report on this by the National Association of Insurance [238] Commissioners -- Do you see that?

A That should take you -- Let's see. It simply says that the California act was modeled after a model act enacted by the National Association of Insurance Commissioners. That's true of all of the acts around the country. The problem is, in

the model act the insurance commissioners said, "We'll take care of it, we'll police it, we'll protect the public." And that is not being done.

Q In fact, it said one proposal was to allow third-party actions, and the insurance commissioners recommended against it.

A That's because when the Moradi-Shalal looked at it, they looked at our legislation, and the fact that the insurance commissioners said, "Okay, we'll do it, we'll handle it."

And they decided, "That's the intention of the statute, let the insurance commissioners handle it. Let them police the violations."

Then the dissent said, "Royal Globe, may it rest in peace, it served California well." That's the first line of the dissent, and then it goes on to say insurance commissioners do nothing, basically. And that was my point.

Q Let's look at --

[239] A They don't have the money. Let's not say they're bad people, because I'm not. I'm not saying they're bad people. I want to be clear about that.

Q Let's look at the holding. The holding is, for lawyers, what the actual decision is. Do you see that?

A Okay. Which line do you want to direct me to? Now we're getting into California law.

Q Part 5. The Royal Globe should be overruled?

A Right.

Q And can you see the last sentence in that paragraph says, "The contrary Royal Globe holding reportedly had resulted in multiple litigation or coerced settlements, and has generated confusion and uncertainly regarding its application. For all the foregoing reasons we have concluded Royal Globe should be overruled"?

A That's the holding, because they determined the commissioners would enforce it, which is not the case.

Q So you know that part of the climate under which insurance companies were operating at the time that these PP&Rs were being generated in the 1980s in California that you've referred to, was basically hand-to-hand combat, where plaintiff lawyers were [240] saying, "Pay me this amount or I'll sue you for bad faith," and there were many bad faith suits being filed.

And in California, many of the PP&Rs by the management people was saying, "Our expenses are getting up too high, be it forced settlements or whatever, and we've got to hold the line." Isn't that true? Isn't that the real way the puzzle gets put together?

A What an incredible leap of faith to get to that place. I don't agree with it, no.

Q Well then, let's look at the comments of Justice Houtz. And you're familiar with the case of White versus Western Title?

A Another California law case.

MR. CHRISTENSEN: I'm going to object to this, renew my objection. I think this is really getting far afield. We're debating California social policy.

MR. CRANDALL: I don't mean to do that.

THE WITNESS: And I can debate California case law with him all day long, and we're not going to agree.

MR. CRANDALL: Here's my simple point, Your Honor. That these PP&Rs which have been criticized as being unfair, are, in fact, defensive tactics of a very hostile climate where the law allowed plaintiff [241] attorneys to coerce excessive settlements by threatening a second lawsuit. And I simply want to bring that out as a matter of explaining why a tough position was taken on some PP&Rs regarding claim costs, and why the company thought it was being --

THE COURT: Limit it to asking that question, and let him make his statement, and let's move on to something else.

Q (BY MR. CRANDALL) Isn't it true that it was recognized, not only by the Royal Globe case, but also by other California cases, that plaintiff lawyers were using the right to sue insurance companies as a way of coercing excessive settlements?

A If you're going to cite something from White versus Western Title, I'd be happy to look at it. White versus Western Title is a case that holds there's a continuing duty of good faith, even in litigation, to insureds. That's what that holding is in White. Now, do you want to read dicta?

Q What did you read this morning? Dicta?

A Dicta.

Q Now, and just so we're all in the same context. The name of the case is White versus Western Title Insurance Company.

A Right.

[242] Q And it was a lawsuit against a title insurance company, it was a first-party lawsuit.

MR. CHRISTENSEN: Your Honor, I'm going to renew my objection. This is becoming extremely collateral.

MR. CRANDALL: I just have one point to ask him about this.

THE COURT: Let's try to make the one point in one question, and we can move on.

Q (BY MR. CRANDALL) Isn't it true that Justice Kaus --

A In his dissenting opinion.

Q -- wrote in his foot note --

A Okay, footnote.

Q -- "the problem is not so much the theory of bad faith cases, as its application. It seems to me that attorneys who handle policy claims against insurance companies are no longer interested in collecting those claims, but spend their wits and energies trying to maneuver the insurers into committing acts which the insureds can later trot out as evidence of bad faith."

MR. CHRISTENSEN: Your Honor, I'm going to object. Counsel has misled the court on where he was headed. He has used in as an excuse to pick out of a [243] footnote of a California case something he would like to say in his closing argument. This has nothing to do with the factual pursuit that he represented to the court he was headed to.

I object to that, and move that that be stricken. And I also add to that, that we're not even talking about the kind of bad faith that we're all here to determine. We're talking about the kind of bad faith that Utah law does not allow to be pursued. And this is confusing and misleading, as well as improper.

MR. CRANDALL: The question is, doesn't the White versus Western Title case and the Moradi-Shalal case indicate that the hostile environment between plaintiff's lawyers and insurance companies in the state of California required State Farm to try to hold the line on escalating insurance claims? That's where I'm going.

THE COURT: Why don't we state that as a question, overrule the objection, allow this witness to answer that question, and then I'm going to require that you move to some other point.

MR. CRANDALL: Thank you, Your Honor.

THE WITNESS: I don't agree with your characterization.

Q (BY MR. CRANDALL) I have to ask it.

[244] A I thought that was the question.

Q Isn't it true that Justice Kaus in White versus Western Title --

THE COURT: Wait a minute, counsel, I was serious. You got that question, he answered it.

MR. CRANDALL: If I consider the question stated to the court as the question to the witness, fine. Thank you.

Q (BY MR. CRANDALL) Do you think that it's appropriate for insurance companies to try to adjust claims?

A If they do it fairly. That's their job, to pay claims, and do it fairly, of course.

Q So you'll agree, an insurance company shouldn't hire adjusters who will simply call, ask for a number from the plaintiff's lawyer, and then write a check.

A That's not the way it works.

Q And so you do agree that it's an appropriate function of an adjuster to try to settle the case for the fair value, which might be less than the lawyer asks for?

A Sure. What the lawyer asks for is not the issue. What it's worth is the issue.

Q When we're talking about duties of insurance [245] companies, one of them is not that the adjuster must handle the claim like he had just fallen off a turnip truck.

A True.

Q You talked about the divisional claim conference.

A Yes.

Q And I have some notes on it, here. And you mentioned yesterday some areas on that.

A Yes.

Q And you were saying that at the divisional claim conference there were some speeches made that you thought indicated an attitude of trying to handle claims unfairly.

A It's not my exact testimony. It was a training seminar, we saw the beginning where Mendoza said, from State Farm, "Take this back with you. Take this information back with you to your people." And then they put their top gun, Guy Kornblum, on to talk. That's training and education. That's part of the process.

Q You referred to the divisional conference, about four different excerpts?

A Yes, a few. And there are many that I have here, and I'm sure there's many that you have.

[246] Q Isn't it a fact that the document I'm holding up here is the entire transcript of the divisional claim conference?

A I have only this much.

Q Let's see what you have. Because I've got so many tabs in here, I could be missing part. Let's go through this, then. Do you have a section on page 00114 for the --

A Mine don't have your page numbers.

Q Then let's look at page 40.

A I think it's separate tapes, separate volumes. My stuff is the bad faith.

Q You don't have the whole conference report, then?

A No, I do not.

Q Let me show you some of the other parts of the conference that were discussed, okay?

A Sure.

Q And, in fact, at the conference --

A Do you want me to move my stuff?

Q Sure. There was discussion about claim staffing.

A Uh-huh.

Q Did you read that part?

A No, I haven't read that part. I've only read [247] the part that dealt with the bad faith section of the conference.

Q Well, let me refer you to certain parts of that.

A Bad faith trials.

Q But have you been provided with the whole divisional claims conference materials, and just picked out the bad faith sections?

A I don't recall if I got it all. I think I got the agenda. I don't know that I got it all. Is this -- This doesn't look familiar to me.

Q Do you see a section in there by Mr. Macherle?

A I don't have Mr. Macherle's section, but whatever you'd like me to read, I'd be happy to read. Do you want me to do this little tag here where you left it open, "Quality"?

Q Sure.

MR. HUMPHERYS: What page are we on?

THE WITNESS: 114, I'll tell you the pages.

MR. CRANDALL: The Bates stamp is 114.

MR. HUMPHERYS: I don't have that.

MR. CRANDALL: 000114.

MR. HUMPHERYS: Is that the trial page?

MR. CRANDALL: Trial page.

[248] THE WITNESS: Okay. Should I proceed? Are you ready?

MR. CRANDALL: As soon as your lawyer --

THE WITNESS: Not my lawyer.

Q (BY MR. CRANDALL) Okay, go ahead.

A We talked about developing guidelines.

Q Quality guidelines?

A Quality guidelines. Next page?

Q Yes?

A "Now, if you use your fair claims practices regulations, the company guidelines for ethical practices, and a feeling for the normal expectations of the public for good service, plus your own experience as a broad framework, you should be able to establish quality guidelines that you feel are reasonable and that can be sustained."

Q So here the divisionals are told, "Use some common sense and follow our written procedures."

A Yeah, but I haven't read the whole thing. Maybe you should ask somebody that's read the whole thing to talk about this part of it. I'll read it, but --

Q There's a section on medical management. You didn't read that?

A I didn't get that portion.

[249] Q You understand this was provided to counsel.
A I'll accept your representation.
Q But you didn't get a copy of it?
A I don't know if I did or didn't. I don't believe I did.
Q You were asked --
MR. HUMPHERYS: What page are we on, counsel?
MR. CRANDALL: I'm going to go to page 000395, trial page.
THE WITNESS: This one we have. This one I have. Would you like me to -- 395?
MR. CRANDALL: Yes, but we have to wait until Mr. Humpherys gets it so he can object if he wants to.
MR. HUMPHERYS: Go ahead.
Q (BY MR. CRANDALL) This is a section where they're talking about lawyers versus lawyers in court; isn't that true?
A That's the beginning of the page, lawyer versus lawyer. And do you want me to keep reading?
Q And this comment about, "Truth is a perception," follows a statement that, "The two attorneys arguing their respective positions, and if equally competent, justice will result." In principle it's a good system. Isn't that true?
A That's what one person says. And then it [250] switches back to Guy Kornblum, and he says truth --
Q It goes on, as you read, "In actuality, truth is illusory. Truth is a perception. Truth is a perception. What the jury perceives in that courtroom is what the jury's going to believe is the truth. Whether, in fact, it actually is or not is another question."
A Right.
Q And so you saw how, in this whole discussion, they talked to the divisionals about plaintiff lawyers can take our documents and misconstrue them, misinterpret them, or twist the words of a claim representative, and make what we're doing, in an honest effort to be fair, seem to be unfair.

MR. CHRISTENSEN: I'm going to object to that. It does not say that.
THE WITNESS: It doesn't say that anyway.
MR. CHRISTENSEN: The whole thing is on how State Farm presents it. That's a total mischaracterization of what the preceding language leads up to, here.
Q (BY MR. CRANDALL) Have you read the entire transcript?
A I've read that entire portion on witness preparation for bad faith cases.
[251] Q And what page did you start on?
A I started on page 1 for that section.
Q We don't have the --
A It's tape 6 of 10.
Q And that section is on page 68.
A Trial preparation seminar, it's on page 1.
Q And what we're reading here is on page 68?
A It's on page 66.
Q Mine says 68. "Truth is illusory"?
A Mine's 66. Maybe mine was typed by somebody else.
Q Yeah, you have a totally different typing. Okay. Look on page -- Let me tell you the page. Sixty-nine minus two, I guess. Sixty-seven for you.
A Okay.
THE COURT: You're talking about the document page, not the trial page. The trial page is 394; is that right?
MR. CRANDALL: I'm looking at trial page 396, Your Honor. And on line, the second paragraph, it says, "That process is how information is developed upon which the jury's going to decide the case"?
THE WITNESS: Mine's on 68.
Q (BY MR. CRANDALL) Okay. But it goes on to say, "It's important that the information be presented [252]

logically, clearly, in well-articulated concepts, and well-articulated sentences."

A That's fine.

Q "Good communication skills are incredibly important in a courtroom."

A That's fine.

Q And you will agree, won't you, that there are some very fine professional people in this world that do their job very well, but might not be articulating, or articulate in explaining how they do it.

A That's true. And I've said that. I don't have a problem with helping people who aren't familiar with sitting in this chair, how it is, and how the reporter is, and --

Q So there are doctors and engineers and lawyers who can do a very good job at what they do, but if asked to explain it, they might not be able to do it so well?

A If they're not used to being here, yes.

Q And you don't think there's anything wrong with helping those people be able to articulate what they do.

A As long as it's truthful, I have no problem.

Q And you will agree that the trial of a bad faith case is, in fact, an adversarial situation.

[253] A I would.

Q And you are aware that leading questions are asked of witnesses.

A Yes.

Q So you don't criticize any company for making sure their witnesses are prepared to articulate what they do, so the truth can come out?

A As long as they don't help them shade the truth. The purpose is to tell the truth and let the jury decide.

* * *

[258] * * *

Q Did you see the tape that was referenced, "Buried Alive"?

A I saw the transcript, did not see the tape.

Q Isn't it true that that had a graphic story in it of a person who threw documents away for the company and went to jail?

MR. CHRISTENSEN: I'm going to object to this. The witness says he hasn't seen the tape.

THE COURT: He said he read the transcript.

THE WITNESS: I read the transcript. But I don't remember him going to jail. It talked about the consequences of failing to destroy records. And did he go to jail?

Q (BY MR. CRANDALL) In fact, it talked about the consequences of making records, keeping records that are required for legal requirements, or regulatory requirements, or business requirements. And if you [259] don't keep the right records you can go to jail.

A I don't think that's what it said. That's not what it said.

Q Isn't it true -- We have the tape.

A That's fine, I read the transcript.

Q It ended with an employee going to jail.

A Uh-huh.

Q For destroying documents.

A Let's look at that transcript.

Q Please.

MR. HUMPHERYS: Your Honor, maybe we could short circuit this. We'll be showing that video a little later, and the jury can then hear what it says, and we can decide what it is.

MR. CRANDALL: I'll withdraw the question.

THE WITNESS: Thanks.

MR. CRANDALL: We just found it.

MR. HUMPHERYS: What page are you on?

Q (BY MR. CRANDALL) I'm going to look at page 21, which is trial page 541.

A I put it back because I thought they were going to watch the tape.

Q Isn't it true that it concludes, "The documents, like cats, seem to have nine lives. Duplicates of some of the destroyed documents appeared [260] in other people's files, others were discovered still in word processing memory and on diskettes, and they could not erase the memories of people who typed, duplicated, routed, or read the documents.

"In depositions under oath, employees, and even the best friend testified that Harry Vaughan had ordered the destruction of documents. One month after the conclusion of the case he was charged with destruction of evidence and perjury"?

A That was because he was destroying while the case was pending and a subpoena was out. That's the reason he went to jail. Pretty scary thing to tell employees, "You'd better destroy things or else you might go to jail."

Q In fact, this tells people you don't destroy things or you'll go to jail, doesn't it?

A Let the jury see the tape.

Q What's your opinion and your thought process and ability to analyze facts in question as a witness? Is it your opinion that this tape tells people to destroy documents, and you're willing to have the jury consider your opinions based upon their conclusions as to what that tape says?

A The tape has lots of parts to it. I've talked about it, I can talk about it some more. It's [261] been described in the document records management program as something to show to all the employees to impress upon them the importance to comply with the records management program. And there's several examples. I think the jury should see the tape.

Q Are you willing to have the jury decide your credibility versus my credibility based on the message of that tape?

A No, that's a small part of what we're here for. Let them see the tape in the context of the overall record management program, and they can decide what they think the tape is for.

Q Thank you. One of the points you mentioned is that you found NAIC data that showed State Farm had only approximately $100,000 in fines total.

A Right.

Q Could that indicate that State Farm's a good company.

A That's not the way I read it. Because I think we've already discussed that at length about that. That the commissioners aren't assessing fines against State Farm. I don't see any need to go back into that. That's why the fines are low, and that's the point of my testimony.

Q Do you have any information, or any evidence [262] that State Farm ever sponsored a hospitality suite at the convention of the National Association of Insurance Commissioners?

A I didn't say State Farm specifically did. I said I was at the meeting, and that was the common concern. So I don't know if State Farm individually did or not.

Q So as you sit here today, you can't say State Farm ever hosted that.

A I don't remember who did it. I just went to several of the meetings and the parties, and different insurance companies hosted them.

Q And let's talk about your claim about State Farm's lobbying expenses.

A Okay.

Q First of all, as a lawyer, are you aware that State Farm is precluded by Illinois law to make political contributions?

A In Illinois?

Q That's their charter state.

A Okay, so in Illinois they can't do it. Are you telling me they don't make political contributions, or lobby the legislature?

Q I'm telling you that State Farm is, by law, precluded from making political contributions.

[263] A Okay, I don't know -- I was talking about, the question had to do with lobbyists and spending. State Farm spends money on lobbyists to lobby the legislature. Is that the same as a political contribution?

Q No, I'm talking about political contributions.

A I don't have an opinion, one way or another.

Q But politicians like Garamendi, or whoever the present insurance commissioner is, Mr. Quakenbush in California, has not received any political contributions from State Farm.

A Okay. If that's the law, and they're following it, that's good. But we're talking about lobbyists. The question asked me was about lobbying money to the legislature.

Q And you're familiar that the California Trial Lawyers Association, or the Consumer Lawyers of California has a lobbyist.

A Uh-huh.

Q Isn't that true?

A Right.

Q You said something today that State Farm's market share can grow because it's cheating.

A That is an explanation for their growth of [264] market share. That's right.

Q So you assume that the members of the general public are fools.

A I'm not saying that.

Q You know that the State Farm automobile insurance, every six months everybody insured by them has the opportunity to change companies.

A As everyone does.

Q And are you familiar with the rate of renewal of State Farm versus other companies?

A No, I know that State Farm is cheaper than a lot of other companies, and so people stay, and it's not until they have a claim that they start to discover, "oh-oh."

Q Isn't it a fact that State Farm's premiums are higher than most other companies?

A That's not been my experience.

Q Do you have documentation on that?

A I've talked to people, and I've seen some of the rates, and the competition, from people that I've talked to. I've talked to many people that buy State Farm because it's the cheapest.

Q Who's your auto insurance with?

A Allstate.

* * *

[265] * * *

Q Talking about producing documents in court, you said yesterday that State Farm requests protective orders when it produced documents.

A Routinely.

Q Okay. And by the way, you are aware that in California and Utah both, claim files of people are privileged by law.

A If you represent it, I have -- I mean I know there's confidentiality and privacy provisions, which can be waived by the parties.

Q Assume that State Farm gets sued by somebody who's upset about the way a claim was handled, and they issue a subpoena to State Farm, or a request to produce, "I want all the other claim files you handled under the similar kind of claim." Isn't it true that State Farm, by law, would have to fight the production of that, because it would be a violation of the rights of privacy of the people involved in those other claims?

MR. CHRISTENSEN: I'm going to object to this. I think that mischaracterizes the law, at least in Utah.

THE WITNESS: And it does in California, too.

Q (BY MR. CRANDALL) Are you familiar with the Pixton cases, Pixton case and the Amerman case?

[266] A Yes.

Q And, in fact, in Amerman, we now have law in the state of Utah that you can't produce third-party claims.

A I'm not allowed to talk about the law.

MR. HUMPHERYS: Objection, that is not what the Amerman case says at all. Perhaps Mr. Belnap can help California counsel on this.

MR. CRANDALL: I'll be glad to take advice on Utah law.

THE COURT: Well, it seems to me that we don't have to have a colloquy on Utah law.

MR. HUMPHERYS: And I guess, Your Honor, we had an objection the other day from State Farm about commenting on Utah law. And I guess I would need to raise the same objection. Let's move on, rather than have him comment on Utah law. I think that's the duty of the court to instruct.

MR. CRANDALL: I'll make it general, Your Honor.

Q (BY MR. CRANDALL) Isn't it true that an insurance company cannot release information it has about its other insureds without being subject to being sued by other insureds?

A I think I need to defer to the court on the [267] legal issues. I haven't been able to talk about the other law. You objected yesterday when I wanted to talk about law. You said I'm not here to talk about law. So I think I should, to keep it even, not talk about law.

Q And by the way, talking about protective orders in these cases, judges have granted protective orders to protect privileged documents; isn't that true?

A They have in some cases.

Q And you're not saying that judges are on a take with State Farm, are you?

A No.

Q So if a judge grants a protective order, it was probably requested in good faith for proper legal reason, wasn't it?

A By State Farm generally, and I won't comment further than that. I don't want to speculate. I'm just telling you it happens, it's frequent. It's not just claims files, it's all their documents. And, "We'll produce them, Judge, but only if they promise not to give them to anybody else." That's the way it usually shakes down.

Q And courts are signing valid protective orders because it's an appropriate decision in that case. You're not saying it's wrong for State Farm to request a protective order.

[268] A No.

* * *

[269] * * *

Q (BY MR. CRANDALL) With all of your records, with all the documents you've obtained, with all the people you've talked to, are you aware of one State Farm insured in the United States who lost their house after an excess verdict?

A I'm not aware of one person that's lost their house, off the top of my head, no.

* * *

REDIRECT EXAMINATION BY MR. HUMPHERYS:

Q Professor Prater, I want to go back to this chart about, if someone in your class got a 99.98 [270] percent on an exam, would you give him an A?

Professor Prater, if one of your students came to you and said, "I've taken your test, I've graded it, I've reviewed everything, and I got a 99.98 percent on my exam, but I'm not going to give it to you, I'm not going to allow you to review it, I won't allow you to look at any of the answers I gave, but take my word for it," would you give him an A?

MR. BELNAP: Your Honor, I'm going to object to --

THE WITNESS: No.

MR. BELNAP: -- to that question, based upon prior court ruling, based upon misrepresentation of thousands of pages of documents that have been produced, statistical books and other matters. If he wants to go into a specific area that he claims that there's foundation for that, so be it.

But there have been thousands of pages of documents produced and discussed, and statistical information given. And we understand that there's some that hasn't been given that they want, that they claim does exist, et cetera. But so be it.

MR. HUMPHERYS: Let me lay foundation for that question, Your Honor.

THE COURT: Okay.

[271] Q (BY MR. HUMPHERYS) Mr. Prater, other than the claim files involved in every specific case, I'd like, in this case, the Campbell file, has State Farm produced any of the files for independent review to determine whether this is empirically valid?

A No.

Q Now I'd like to talk about their BI claims for just a moment, so we understand what we're dealing with, here. In their BI lawsuit reports, from which this chart was made and the statistics are computed, do their wins and their losses --

Well, let's see, I've got the wrong chart. Anyway, we've seen it, where they have how many they've won and how many they've lost. Do these figures include any case against State Farm, win or lose?

A No, it doesn't include all of them.

Q So all of the lawsuits against State Farm are not included in the win-loss statistics.

A No.

Q Does it include any bad faith case against State Farm?

A No.

Q Do those figures include any class actions that involve millions of people in their statistics?

A Not to my knowledge.

[272] Q Do they include excess claims?

A No.

Q Now, would Mr. Campbell's lawsuit back in 1983, that resulted in an excess verdict, would that even have been included in their BI lawsuit report statistics?

A Not as I understand it.

Q So it wouldn't be a win or loss, it simply would not be counted?

A Right.

Q How reliable, in your opinion, are those figures, where they have a 98 percent winning ratio?

MR. CRANDALL: Objection, no foundation.

MR. HUMPHERYS: Your Honor, I've just gone through all of the cases that are not included. That's foundation.

MR. CRANDALL: Which we dispute. I don't think there's a foundation that those aren't included. I don't think he has the evidence to support it.

MR. HUMPHERYS: Let me lay a foundation to that.

Q (BY MR. HUMPHERYS) In each of those items that I just went through that are not included, are those specifically mentioned in the general claims memo by the corporate office not to include them?

[273] A They're specifically not included, in my recollection. A bodily injury lawsuit third-party report. That's my understanding.

Q And that's based upon State Farm's own memos?

A That's my recollection of what I saw.

Q Okay. So, now, let me ask you, are those figures that represent a 98 percent winning ratio on the part of State Farm, are those accurate, or deceptive?

A I don't -- Based on what I've seen, they're not accurate. But I think that's better left to the statisticians than me.

Q All right, we'll do that. We'll talk to a statistician about that. Now, let me cover just a couple of other things. I'm very mindful of what I represented a couple of minutes ago. There was talk about how much space all of these documents take. You mentioned that State Farm had recently come to your home and copied all of these tens of thousands of pages of documents.

A Right.

Q How were they copied? I'm not asking you the mechanics, but how were the documents stored? In what way?

A An optical disk.

Q All right. Now, can you show the jury, if [274] you can, by demonstrating, how much space an electronics storage disk takes, when compared to all of these boxes behind us?

A It wasn't very much. I don't remember, but it was just a little bit, a little bit of space.

Q You mean all of these documents, tens of thousands, can be stored in a small little disk?

A That's my understanding, yeah.

Q And they made you a copy of them while they were doing it?

A They're going to give me one when I get home. They promised me a copy of the documents, what for, I'm not sure, as well as a disk. That has it all stored on it.

Q Now, counsel asked you about statistics, and whether you've had enough statistics to be able to reach your conclusions. And you were saying, "I can conclude based on documents and testimony and so forth."

A Yeah.

Q I'd like to refer to the testimony of Paul Short, a few days ago. One of the last questions that were asked, Mr. Christensen said, "Are you proud of the way State Farm has treated Campbells?"

And his answer was, "I'm proud of the way State Farm treats everyone."

[275] What does that mean to you, in terms of determining whether there is a pattern and practice of wrongful claims practices?

MR. CRANDALL: Objection, Your Honor, irrelevant. The witness is not the fact finder.

MR. HUMPHERYS: Your Honor, Mr. Crandall has asked this witness a number of times, quoted witnesses, and asked him to comment on them.

THE COURT: I'll allow it. Overruled.

THE WITNESS: Well, it suggests that they're proud, and they've done nothing wrong in this case, which I think is outrageous.

Q (BY MR. HUMPHERYS) Even though a jury has found them in bad faith?

A Yes. They still wouldn't even admit it in this trial.

MR. CRANDALL: Objection, misstates the evidence, Your Honor.

THE COURT: I'll let it stand, but the evidence is before the jury as to what has been stated by the other witnesses.

Q (BY MR. HUMPHERYS) Let me ask you a couple more things. He asked you whether the claims superintendent's manual has been superseded, and the Excess Liability Handbook, and some of the other written [276] documents.

A Right.

Q Mr. Prater, have you seen any publications from State Farm instructing their employees not to engage in the offending portions of these manuals, as opposed to a memo simply saying, "These manuals have been withdrawn"?

A Not that I recall, no.

Q Why is it important to either send out such a notice, or not?

A Because once they've been trained and indoctrinated in one method over a period of time, and those people have trained all of them, it takes a real big effort to retrain them all.

Because you just don't stop the ship that's going out this way by sending out a memo. That's why they had to send out a second one. And I don't think it's done any good. I think you'd have to go back to claim schools.

And I've recommended to State Farm in the past that a good start, and this is for State Farm's claims management to know, would be to get a little name tag on each claims person's desk, and put there, "We're here to pay claims," and start readjusting the attitude. That would be a good start.

[277] Q Is there a difference in withdrawing a manual and training personnel not to do unfair claims practices?

A Yes.

Q Ms. Bird's testimony was referred to a number of times by counsel, about how she tried earnestly to pay fairly and deal honestly with people. Is Ms. Bird still employed by State Farm?

A No.

Q Is Mr. Noxon still employed by State Farm?

A Yes, it's my understanding he is.

Q And is Mr. Noxon's supervisor at the time, John Martin, still employed by State Farm?

A It's my understanding he is.

Q Was Ms. Bird pressured to try and reduce her average paid claims?

A She testified she was.

MR. CRANDALL: Objection, no foundation.

Q (BY MR. HUMPHERYS) Did you read Ms. Bird's testimony?

A Yes.

THE COURT: All right, foundation is established, overruled.

Q (BY MR. HUMPHERYS) Okay, did Ms. Bird testify that she was pressured to try and reduce her [278] claims?

A Yes.

Q Did she testify that she was pressured to try and pay less than fair value?

A Yes.

Q Did she admit that she had done that on occasions due to the lack of authority by Mr. Noxon?

A Yes, she did.

Q Now, I'd like to cover just a point or two on these graphs. I appreciate you're not a statistician, you've made that very clear, but I would like to ask you a couple of points. Is there anything on this graph that would indicate whether or not, at the starting point in 1980, State Farm was underpaying claims?

A It doesn't tell you.

Q If they were underpaying claims in 1980, would that accurately represent whether or not fair value was being paid?

A No.

Q Is there anything in these graphs that have been prepared by State Farm that indicates what the inflation was on these particular kinds of coverages?

A No.

Q Is there anything on these graphs that indicate whether these increases even kept up with [279] inflation, was above or below inflation?

A No, there's not.

Q State Farm indicated that there was some study done, in cross examination, that the net recovery by claimants is less if they hire a lawyer, on the average basis. Now, I don't know the validity, but I want you to assume what he represented was correct.

A Okay.

Q Let me ask a couple of leadup questions. Should State Farm offer less to a claimant merely because they are unrepresented?

A No.

Q Is it fair to tell the claimant, "You'd better not hire a lawyer because the net recovery you'll get will be less, even if we pay more"?

A No.

Q Is it fair to force a claimant to hire a lawyer, and thereby lose part of the recovery, due to the fees and costs?

A No.

Q Should a company pay fair value, whether or not there is a lawyer?

A They should.

Q Now, there were some questions about field audits from the commissioners, and I've got three [280] minutes, four minutes before the big bang. And I'll be done.

THE COURT: You're representing Mr. Christensen's not going to stand up after you?

THE WITNESS: That was a good one.

MR. CHRISTENSEN: I'm not going to take his heat. This is up to him.

Q (BY MR. HUMPHERYS) Counsel for State Farm indicated that, asked you about some field audits.

A Yeah.

Q Do you recall Ms. Bird's testimony that in the ten or so years that she worked for State Farm, the insurance department had never come in and audited any of her files?

A I recall that.

Q Now, I want you to assume that there were audits of claim files.

A Okay.

Q I want you to assume that the claim files had self-serving letters in them.

A Okay.

Q Documents and other information adverse to their position removed.

A Okay.

Q Controversy and other derogatory comments [281] left out.

A Okay.

Q Do those claim files accurately represent what occurred in the claim file to allow an independent audit to determine whether there's unfair claims practices going on?

A No.

Q Is that the reason why the Excess Liability Handbook is so damning, because it talks about self-serving documents and buildup files?

A That's certainly one of the negative comments in the manual.

Q Can an insurance commission even expect to get an honest audit if the claim files do not represent an accurate picture of what's gone on in the case?

A No.

* * *

[282] **RECROSS EXAMINATION BY MR. CRANDALL:**

Q And you said that the statistics show that 12.5 percent of the cases are being low balled.

MR. HUMPHERYS: Your Honor, I object, this is way outside the scope of redirect.

MR. CRANDALL: It goes to the statistics.

THE COURT: Well, what is your question?

Q (BY MR. CRANDALL) Isn't it true that that 12.5 percent is only the percentage of the cases that go to trial, not the percentage of all the cases?

A We, it's 12.7 percent, and it's based on this other chart that I got.

Q And it's 12.7 percent of what?

A Of the cases that go to trial.

Q Which is what percent of all the cases?

A Well, for another chart according to your statistics.

Q Pardon me?

A Well, it's going to be the minority.

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